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THE CONTACT OF PUBLIC AND PRIVATE LAW.

LOOKING for a definition of my subject, I find in my learned and lamented friend Professor Dicey's introduction to the second edition of his *Law and Public Opinion in England*, written in 1914, a sentence which will serve better than any definition of my own. "Since 1859"—the date of Mill's *Essay on Liberty*—"almost every event which has happened has diverted public attention to the extreme difficulty, not to say the impossibility, of drawing a rigid distinction between actions which merely concern a man himself and actions which also concern society." That is a clear statement in untechnical terms of the facts underlying the formal distinction between Public and Private Law, and of the fact that the relations of the two classes of actions and of the rules of law dealing with them have become in our own time, and are still becoming, more and more intimate and complex. It has more than once been observed of late that Public Law is encroaching on Private Law. Perhaps it has not been sufficiently noted that this process by no means obliterates the distinction between them, but on the contrary makes it all the more needful to bear it in mind. Confusion and trouble must arise when private rights arising out of legal or administrative rules established with a primary view to the public weal are treated as if they were matters of merely private interest, and when the framers or administrators of measures designed for the public good ignore the various ways in which private rights will be affected.

It is well known, indeed, or ought to be, that legal classification is an arrangement not of human acts and institutions but of their legal aspects, and it is the exception when any but the

simplest events or transactions can be brought wholly within one category. Ulpian's definition in the matter in hand is venerable: "*publicum ius est quod ad statum rei Romanae spectat, privatum quod ad singulorum utilitatem*";¹ and I have said elsewhere that I do not think it capable of much improvement. He did not say that the public good and private interests might not be involved in the same affairs, and in fact "many institutions are from one point of view regarded as *publici*, from another as *privati iuris*"² in the classical texts of Roman law. For the rest, it is not clear that the formal distinction was in general use before Justinian fixed it in the Institutes; we do not find it in Gaius.³ It was unfamiliar to most English lawyers before our own time, and it is very possible to do without any verbal use of the terms, so much so that I find no mention of them in Sir John Salmond's *Jurisprudence*. Sir T. Erskine Holland, on the other hand, treats the division as not only classical but radical, and fortifies his position by going back to Demosthenes and Aristotle. Whatever terms we use, the distinction is there in fact; the very practical difference between civil and criminal jurisdiction is only one aspect of it.

In archaic societies all or nearly all public law, not excluding the duty of military obedience in war time (for there are war-gods and the military oath is sacred) is connected with religious ordinance and custom. The family, too, is a mainly religious institution, and the religious sanction extends in its affairs far beyond the secular. But all private rights of personal standing spring from the family and are controlled by its constitution; full age, for example, is not perfect without emancipation. Hence family relations afford the most ancient and frequent meeting-points of the conceptions belonging to public and to private law. Marriage is the most striking example of the contact. Capacity to marry, the necessary forms and conditions of lawful marriage, the operation of marriage on the legal rights, powers and liabilities of husband and wife—all these are matter of public ordinance in which the parties have no discretion except, it may be, as to the choice between alternative ceremonies and, under the Napoleonic code, alternative "*régimes*" of property. Incidental to marriage, on the other

¹ D. I. i. de instituta et iure, 1, § 2. Justinian's compilers added "*pertinet*" at the end of the sentence; one does not see why. Ulpian's following context gives a rather narrow view of the contents of public law; probably his immediate purpose was to warn the reader that he would not find anything about such obviously public matters as offices of State, religious or secular.

² Dr. Moyle on Inst. I. i. 4.

³ Paulus, however, contrasts *utilitas privatorum* with *vigor publicae disciplinae*. D. 39.4.9, § 5.

hand, are various antecedent or subsequent free dispositions of property (commonly framed, in England at any rate, on a pretty constant customary type); from such dispositions, and also from the provisions of the general law itself, the children of the marriage or other persons may acquire rights which, if they need assertion, must be asserted in the ordinary course of private law; while violations of conjugal duty give rise to claims which are apt to be assigned to a peculiar jurisdiction and can only be described as of a mixed kind.⁴ Contentious discussion of marriage and divorce law would seem, therefore, to call for rather special wariness. In fact, however, the topic being one that appeals to several irrational emotions, we find combatants on both sides taking no heed at all of the motives for discretion. Thorough-going conservatives take their stand on the sanctity of the family and treat the convenience of individuals as negligible, forgetting first that whether their favourite dogmas do preserve the family with perfect or tolerable success is one of the points in dispute, and next that institutions which deliberately require innocent persons to endure great suffering and unhappiness lie under a peculiar burden of proving that the results are worth their price. Extreme reformers, on the other hand, sometimes talk as if there were no element of public welfare to be considered at all, but only the convenience of the parties (not even that of their children, one would think sometimes). Presumably learned persons have even committed themselves to such manifestly absurd positions as that marriage is like any other contract. Arguments purporting to be founded on infallible knowledge or a demonstrably true construction of Divine ordinances are obviously not open to the criticism here made, and I have nothing to say of them for the present purpose. Such arguments are more commonly adduced on the conservative side, but they have sometimes been used by reformers who admitted the existence of a superhuman rule but claimed to interpret its effect by their own judgment.

When we pass from marriage to ordinary civil contracts we are in a region which has always been esteemed the very stronghold of private law. Here if anywhere the will of the parties governs, and the law becomes their servant. Nevertheless rules of public policy, whereby it is laid down that various matters *ad statum populi pertinent* to such an extent that they cannot—it may be altogether, or it may be within certain limits—be the

⁴ In one British colony conquered from Spain it was found impracticable either to retain the Roman ecclesiastical jurisdiction or to put any other in its place, and in that colony there is, or quite lately was, no jurisdiction at all in matrimonial causes.

subject of unrestricted private bargain, form a somewhat important rubric in the books on contract; and thus we have the public and the private point of view contending before the judgment-seat even in strictly commercial affairs. Agreements in restraint of trade are by far the most important class of cases in which that contention arises. The deeply rooted abhorrence of the common law for monopoly keeps a watchful eye on the safeguards alleged to be necessary for the future protection of buyers of goodwill or employers in occupations of special skill and confidence from the competition of the vendors or departed employees, as the case may be. The commonwealth is not lightly to be deprived of the benefit of a craftsman's art. Any text-book will tell the reader how hard it has been found to work out the results on any consistent method. For about a century and three-quarters the Courts attempted to lay down hard and fast rules, but that solution, after being stretched as far as it would bear, was finally discarded by the House of Lords in the *Nordenfelt Case* in 1894. A superficial observer might have predicted that this was the beginning of extinction for the whole doctrine. But it appears that, since the Courts have been bound to form an estimate of the merits on the facts of each case, the tendency of the decisions has been rather more unfavourable to restrictive covenants than it was before, and now there is something very like a positive rule that an employee for a term cannot restrain himself generally from competing with the employer when the term is over.⁵

In the region of larger industrial disputes there has been the most lamentable confusion, and it is hard to say which party is the more to blame for it, or on which side partisan excess has been greater. About thirty years ago, when I was a member of a Royal Commission on Labour, which collected and arranged a great mass of information with little other result, my impression was that many of the workmen's leaders were very ill-informed, but the obstinacy of obstinate capitalists was less excusable considering their means of better knowledge. Anyhow, both sides talked as if nothing had been in question but their own particular interest. The attempts made in the course of the late eighteenth and early nineteenth centuries, first to suppress trade unions altogether and then to restrain their action within the narrowest bounds, were not so bad in their motives as trade unionists believed and probably still believe. It was a common and honestly held opinion that, if the common

⁵ *Attwood v. Lamont* [1920] 3 K. B. 571, C. A.

law abhorred monopoly, concerted plans to raise wages tended to an artificial monopoly of labour and were therefore—as a most worthy bishop once said of enthusiasm—a very horrid thing; and some Judges, at any rate, who flourished in the orthodox economic age of our grandfathers were prepared to denounce restrictive combinations of employers, no less than those of workmen, as conspiracies. The result of each party conscientiously believing the law, or at least the general principles of legal justice, to be wholly on its own side was to add to the confusion and obscurity of topics already far from clear. A period of reaction from the old doctrines, not only of Tory legislators but of Radical economists, culminated in the Trade Disputes Act of 1906, a barefaced piece of class legislation due to pressure astutely exerted by the trade unions at the time of the preceding general election upon the Liberal candidates who by the result of that election became the majority of the House of Commons. Those who framed—or, rather, those who dictated—the Act were evidently thinking of anything rather than the public good or the maintenance of the equality of citizens before the law. Trade unionists (and nominally capitalists also, so far as they may enter into similar combinations) are taken out of the common law and made privileged persons. Perhaps it would be better for us at this day if, like our French neighbours,⁶ we had started from the general presumption of Roman imperial law that all associations for any purpose of common interest whatever, industrial or other, are capable of being a danger to the commonwealth and must be kept in strict order. In some points and at some times the inconvenience might have been greater, but the reform when it came would have been more rational and effectual. It is easier to reverse a wrong dogma broadly stated than to amend a system whose defects are numerous, of various degrees of importance, and incongruous. I do not assume that there was nothing to be said for the prejudice against *collegia illicita* or indeed *collegia* without qualification. A doctrine which can vouch such diverse patrons as Justinian, Hobbes, and Rousseau (in whose name the Jacobins actually suppressed the French Academy for a season) must, I suppose, have its attractions, though the general fear and dislike of the *esprit de corporation* never gained a footing in England.

In company law the rules now known by the compendious name of the *ultra vires* doctrine were formed by decisions which

* See Dicey, *Law and Public Opinion*, appx. note 1.

began with treating an incorporated company as merely a magnified partnership and regarded almost exclusively the grounds on which a partner might refuse to be bound as between himself and the managing members. Consideration of the public interest did not fairly assert itself till after the middle of the nineteenth century, and lawyers steeped in the individualism of equity suits, who had forgotten or never heard of the older authorities, had some difficulty in realizing that incorporation meant anything more than a device for avoiding troublesome questions of parties.⁷

Equity had indeed taken a very different line in its earlier days; the rules overriding express terms of agreement which are now received as peculiar rules of construction rather than rules of law, save on one or two points, are too familiar to need rehearsing. Here the dominant point of view is the protection of the weak from oppression, not unmixed with the canonist opinion that usury is scandalous, as a sin gravely displeasing to the Divine law and an anomaly censured by Aristotle; the claims of ecclesiastical law, certainly, are the claims of a species of public law, but the spiritual and temporal motives cannot well be separated.

It will be understood that the foregoing short observations are mere summary indications of a line which the student may amuse himself with pursuing more fully or in other branches if he will.

FREDERICK POLLOCK.

⁷ Cf. Mr. H. J. Laski's ingenious chapter, "The Early History of the Corporation in England," in *The Foundations of Sovereignty*, London, 1921.

THE NEW RULES OF PLEADING OF THE HILARY TERM, 1834.

Did they affect the Development of the Substantive Law?

THE old system of pleading has passed so completely into the limbo of things forgotten that the title of this paper is not intelligible without an explanation. I must, therefore, remind the reader that, in pursuance of the Second Report of the Common Law Procedure Commissioners, which was issued in 1830, the Judges made some new general rules as to pleading in the Hilary Term of 1834 which, on the whole, tended to aggravate the existing evils of the common law system of special pleading, by making special pleading compulsory where it had before been only optional. Something was done to alleviate these evils by the Common Law Procedure Acts of 1852, 1854, and 1860; but they were not wholly eliminated till the new system of procedure and pleading introduced by the Judicature Acts. The result was that right down to the Judicature Acts the system of pleading was the old system; and, subject to the modifications introduced by the Common Law Procedure Acts, the old system aggravated by the new pleading rules of the Hilary Term, 1834. Now it seems to me that there are certain developments in common law doctrine in the nineteenth century which may in part, at least, be traced to the indirect influence of these new pleading rules. But it is obvious that before I can even state my thesis I must explain some of the characteristics of the old system of special pleading, and the effect of these new pleading rules. I shall therefore divide this paper into these three parts, and deal firstly with certain characteristics of the old system of special pleading; secondly, with the new pleading rules of the Hilary Term, 1834; and thirdly, with the question of their effect on the development of the substantive law.

Some of the Characteristics of the Old System of Special Pleading.

Maitland, speaking of the common law system of pleading in its latter days, happily characterised it as "The most exact, if the most occult, of the sciences."¹ But though it had always been "exact," it was not till the latter part of the eighteenth century that it had begun to assume the airs of a science. It is true that from the earliest period the lawyers and Judges had spoken with the utmost respect and reverence for the art of pleading²; and it was natural that they should do so. It was a branch of the law of procedure; and, since it was from the law of procedure and around the forms of action that the principles of the common law were being developed, and since the maintenance of these forms of action was, right down to the beginning of the nineteenth century, regarded as a vital necessity for the being of the common law,³ it is not surprising that a subject so intimately bound up with these forms of action should be regarded as equally necessary to its being.⁴ But, though the extreme importance of the art of pleading had been well recognized from the earliest period in the history of the law, it was not till much later that the lawyers began to insist that its rules were so logical as to be inevitable, and that the system was so scientific that any radical change must be for the worse, and would inflict damage not only on the law of pleading but on the common law as a whole.⁵ It is, I think, probable that the growth of this feeling was rendered possible by the treatises which summarized and linked up the Year Book cases with the numerous decisions of the sixteenth and seventeenth centuries. One of the most important of these books was the *Doctrina Placitandi*, published in 1677, which grouped these rules under alphabetical headings. A still more important work was con-

¹ P. & M. ii. 609.

² See Littleton's words in § 534 of his *Tenures*.

³ Thus, in *Bryant v. Herbert* (1878) 3 C. P. D., at p. 390, Bramwell, L.J., said that the Common Law Commissioners did not abolish the forms of action in words. They "recommended that; but it was supposed that, if adopted, the law would be shaken to its foundations; so that all that could be done was to provide as far as possible that, though forms of action remained, there never should be a question what was the form."

⁴ Thus the Commissioners on the Courts of Common Law said in their Third Report (Parlt. Papers, 1831, vol. x. 6) that much confusion and uncertainty as to the right of action would be generated if the forms of action were abolished, "and so much of our course of pleading would also be unsettled by it that in this point of view alone more advantage would be lost than gained."

⁵ Thus Coke says, First Instit. 303, "when I diligently consider the course of our Books of years and terms from the beginning of the reign of Edw. 3, I observe that more jangling and questions grow upon the manner of pleading, and exceptions to form, than upon the matter itself, and infinite causes lost or delayed for want of good pleading." There is no idolatry here of the art of pleading.

tained in the article on "Pleading," in *Comyns' Digest*. It was, says Stephen,⁶ "a more systematic compilation upon this subject than had previously appeared; comprising the substance, not only of the authorities collected in the *Doctrina Placitandi*, but also of the cases subsequently decided, and reducing the whole, under different heads, upon a plan peculiarly scientific and masterly." A similar work of digesting and arranging the rules of pleading was done by Chitty's book, which was published in 1817, and, with respect to some of the rules of the subject, by Williams' notes to Saunders' reports. These works were in the nature of digests of the rules; but, by showing the connexion between the various parts of the subject, they made it possible to represent it as consisting of a collection of well-conceived principles logically worked out into detailed rules. We can see the growth of this feeling at the latter part of the eighteenth and the beginning of the nineteenth centuries. In 1757 Lord Mansfield could say that "the substantial rules of pleading are founded in strong sense and the soundest and closest logic."⁷ In 1768 Blackstone could talk of the science of pleading.⁸ In 1820 Runninton, the editor of *Hale's History of the Common Law*, said, "the science of pleading (however those who do not understand may affect to despise it) is admirably calculated for the purposes of analysing a cause; of extracting, like the roots of an equation, the true points in dispute, and referring them with all imaginable simplicity to the court or to the jury. It is reducible to the strictest rules of pure dialectic."⁹ The way was clearly prepared for Stephen's work—the first work, as he points out, ever written on the principles of pleading—which was published in 1825. He did more than anyone else to demonstrate the logical and scientific character of its chief principles and, as we shall see later,¹ to postpone any radical reform of the system.

At first sight it is not immediately obvious why the elaboration of the law, which was proceeding from the sixteenth to the nineteenth centuries, should have resulted in this widespread belief that the system of pleading was so logically and scientifically perfect that no radical reform was necessary or desirable. It was due, I think, to two main causes. In the first place, this elaboration of the law was effected through the agency of decided cases. Now, as Sir F. Pollock has pointed out, the

⁶ *Pleading*, preface to the 1st ed.

⁷ *Robinson v. Rayley*, 1 Burr., at p. 319.

⁸ Comm. iii. 305.

⁹ Hale, H. C. L. 212.

¹ Below, 270.

mental operations which result in the production of a body of case law "have a truly scientific character," since the decision of each case involves an inference as to a rule of law applicable to the facts, just as the explanation of a natural phenomenon involves an inference as to the particular scientific law which may have produced it²; and just as the observation and explanation of different natural phenomena lead to the discovery of new and the elaboration of old scientific laws, so the decision of new cases leads to an elaboration of the rules of law. But the decision of each of these new cases is justified as the logical consequence of the cases previously decided. Hence the law assumes a logical and a scientific form. It may be that the premises from which these rules of law are deduced are arbitrary or archaic, as was the case with many of the older rules of the law of pleading. But the deductions drawn from them were logical deductions, and so the superstructure raised on their foundation took a scientific form. Those who were concerned in erecting this logical superstructure somewhat easily forgot the dubious character of some of the premises on which it was founded, and in their admiration of the processes of reasoning by which it was erected forgot the harmful results which followed upon it. They became the slaves of technicalities which had ceased to have any real meaning.³ These technical rules could not be "put into sensible English," and that, as Sir F. Pollock has said,⁴ is the test of the soundness of a technical rule. In the second place, this danger was much increased in the case of the law of pleading, because a great number of its more important rules were eminently sound and sensible rules, logically well designed to produce the effect for which they were intended—the formulation of an issue. Stephen, speaking of its leading principles, could say with some justice that, "when properly understood and appreciated, it appears to be an instrument so well adapted to the ends of distributive justice, so simple and striking in its fundamental principles, so ingenious and elaborate in its details, as fairly

² *Essays in Jurisprudence and Ethics*, 246-9.

³ "The technical terms of every language are convenient symbols, but their very convenience is dangerous, and the facility given by them is always in danger of abuse. When one is operating with symbols it is often a good thing to forget what the symbols mean during the process, but one must always be prepared to remember it at the end. Now a fixed habit of operating with a certain number of symbols is apt to induce one to forget this very thing, the result of which is that the operator becomes the slave of his symbols instead of their master, and thinks he is thinking when he is only playing with counters. . . . In our case law there has been a good deal of this kind of diseased technicality": Pollock, *Essays in Jurisprudence and Ethics*, 258-9.

⁴ *Essays in Jurisprudence and Ethics*, 259.

to be entitled to the character of a fine juridical invention." But naturally those who spoke of it in these terms tended to slur over the distinction between those parts of it which were sensible and well adapted to get the facts at issue before the Court, and those parts of it which consisted either of a series of elaborate rules founded on ideas which had long lost any meaning which they had once possessed, or a series of shifts or devices to circumvent rules which had lost their usefulness. They were inclined to cherish all parts of their science, and to cut down all projects of change to a minimum.

The results of these ideas upon the development of the law were most unfortunate. In the first place, both the system of pleading and the system of procedure in which it played so important a part tended to grow more elaborate and more rigid as time went on. Now a rigid system of procedure is no doubt necessary in an early stage of legal development. As both Roman and English law show, there is need at such a stage of a stable framework of actions, round which the substantive rules can take shape and give rise to distinct legal doctrines. But as these legal doctrines grow in number and complexity, they should be able to emancipate themselves from the leading-strings of the old forms of action. That is what happened at Rome when the *legis actio* procedure gave place to the formulary procedure, and when that in its turn gave place to the extraordinary procedure. In England, on the other hand, right down to the middle of the nineteenth century, the substantive law was still cramped by the forms of action; and it only developed because, under cover of numerous fictions, these forms of actions had been largely extended. But in spite of these extensions, suitors could only get redress if they could put their pleadings into a shape which was determined by a mass of technical rules coming from all periods in the long history of English law. We have seen that many regarded the preservation of these forms of action as essential to the continued existence of English law.⁵ Similarly most lawyers regarded the rules of pleading as a science so perfect that it was dangerous to tamper with any but the most unimportant of its rules. Thus the fetters both of an obsolete system of procedure and of an unduly rigid and elaborate system of pleading seemed to be firmly riveted upon the common law.

From time to time attempts were made both by the Legislature and the Courts to remedy these defects. The Legislature

⁵ Above, 262.

passed statutes of Jeofail⁶ between the years 1340 and 1718, and in 1705 allowed a defendant with leave of the Court to plead several pleas in his defence.⁷ The Courts in the eighteenth century were more liberal in allowing amendments to pleadings⁸; and some alleviation of the extreme precision of statement required in pleadings was allowed by permitting details to be inserted under a *videlicet*, in which case it was held that proof of details divergent from those so inserted would not be fatal.⁹ But none of these expedients was so efficacious as the power which a defendant had always had to plead the general issue.

The general issue, says Stephen,¹ is "an appropriate plea fixed by ancient usage as the proper method of traversing the declaration, in cases where the defendant means to deny the whole or the principal part of its allegations." Thus in *formedon* the general issue was *ne dona pas*; in debt on a specialty *non est factum*, and on a simple contract *nil debet*; in *assumpsit*, *non assumpsit*. The effect of pleading the general issue was thus to contradict generally the plaintiff's allegations, and to put a summary close to the pleadings, thus, as Stephen has said,² "narrowing very considerably the application of the greater and more subtle part of the science of special pleading." It was because it had this effect that it gave to litigants the most effectual relief from the risks to which the system of special pleading exposed them; and it was the more efficacious because, from an early period, the Courts held that a special plea which only amounted to the general issue was bad. In other words, they refused to allow special pleading if the general issue would serve. This rule was well recognized in the Year Books,³ and it was maintained throughout the history of this branch of the law.⁴ Possibly at the outset the rule was established, because the Court preferred to use the old formulae. In later times, it is true, it was sometimes justified and explained by saying that the use of a special plea, when the general issue was sufficient, would be a breach of the rule that a plea must not be multifarious or argumentative.⁵ But

⁶ For this phrase and its origin, see Holdsworth, H. E. L. (3rd ed.), i. 223, n. 5.

⁷ 4 Anne, c. 16, s. 4. For some of the defects of this statute, see First Report of the Common Law Procedure Commissioners, Parl. Papers, 1851, vol. xxii. 19.

⁸ Bl. Comm. iii. 406.

⁹ Parl. Papers, 1851, vol. xxii. 16.

¹ Pleading (1st ed.), 172.

² *Ibid.* 176.

³ See, e.g., Y.B. 10 Hen. VI. Mich. pl. 53.

⁴ See, e.g., *Lynner v. Wood* (1630) Cro. Car. 157; *Gifford v. Perkins* (1676) 1 Sid. 450; *Saunders' Case* (1702) 12 Mod. 513-4.

⁵ *Gifford v. Perkins* (1676) 1 Sid. 450; Stephen, op. cit. 414.

probably Stephen is right when he says that the real reason why the Courts continued to favour the rule was the fact that it prevented prolixity.⁶ "The reason of pressing a general issue," it was said in 1616,⁷ "is not for insufficiency of the plea, but not to make long records when there is no cause, which is matter of discretion." Since the Court had a discretion as to when it would hold a special plea to be bad as amounting to the general issue, it was possible for the Court either to enlarge or to restrict the scope of the rule; and, as the art of special pleading grew more complex, the tendency of the Courts to use their discretion to insist on the use of the general issue whenever possible, and to allow it more and more scope, became more pronounced.⁸ This tendency was seconded by the Legislature. Statutes of the seventeenth and eighteenth centuries expressly allowed the general issue to be pleaded in certain actions in which it would not otherwise have been applicable.⁹

The history of this tendency to favour the general issue, and the reasons for the larger scope given to it in the eighteenth century, are admirably summed up by Blackstone in the following passage¹: "Formerly the general issue was seldom pleaded, except when the party meant wholly to deny the charge alleged against him. But when he meant to distinguish away or palliate the charge, it was always usual to set forth the particular facts in what is called a *special* plea; which was originally intended to apprise the court and the adverse party of the nature and circumstances of the defence, and to keep the law and fact distinct. And it is an invariable rule, that every defence, which cannot be thus specially pleaded, may be given in evidence, upon the general issue at the trial. But, the science of special pleading, having been frequently perverted to the purposes of chicane and delay, the courts have of late in some instances, and the legislature in many more, permitted the general issue to be pleaded, which leaves everything open, the

⁶ Op. cit. 414.

⁷ *Warner v. Wainsford*, Hob. 127.

⁸ Thus, in *Paramour v. Johnson* (1701) 12 Mod., at p. 377, Holt, C.J.: said: "it is indulgence to give accord with satisfaction in evidence upon *non assumpsit* pleaded; but that has crept in, and now is settled."

⁹ Thus, by 21 Jac. I. c. 12, s. 5, the general issue was allowed to be pleaded in actions against certain officials; by 11 Geo. I. c. 30, s. 43, the Royal Exchange and London Assurance Companies were allowed to plead the general issue in actions against them on their policies; and it is stated in the Act that "by reason of the necessity of pleading specially in such cases the whole merit of the case in question cannot oftentimes come into consideration"; see also Stephen, op. cit. (5th ed.), 189, n. (c).

¹ Comm. iii. 305-6.

fact, the law, and the equity of the case; and have allowed special matter to be given in evidence at the trial." That the large scope thus given to the general issue was the best corrective to the defects of special pleading was the opinion of Runnington, who said in 1820 that "nothing would more prevent 'the many miscarriages of causes,' or more promote the ends of justice, than to enact that the defendant shall in all actions, on giving previous notice of his intended defence to the plaintiff, be permitted to plead the general issue, and give the merits of his case in evidence."² The reasons for these views expressed by Blackstone and Runnington, and indorsed by the Legislature, we shall see if we look at the large scope given to the general issue in two of the commonest classes of actions brought before the Courts—the action of *assumpsit* and the action on the case.

If the defendant in an action of *assumpsit* pleaded the general issue *non assumpsit*, he put in issue, not only the question whether or not the promise was made, but also any fact which tended to impeach the validity of the promise, and any matter of defence which showed that he was not liable; so that, though the words *non assumpsit* literally only traversed the promise, the fact, for instance, that the promise had been made and released could be given in evidence under this issue.³ Similarly the general issue "not guilty" in actions on the case was literally only a traverse of the facts alleged, but a defendant who pleaded it was allowed to prove any matter of defence tending to show that the plaintiff had no right of action.⁴ Likewise a defendant who pleaded "not guilty" to an action of trespass *quare clausum fregit* could deny both that the land was the plaintiff's and that he committed the trespass alleged, and could compel the plaintiff to prove both these facts.⁵ In fact, a defendant who pleaded the general issue disputed and therefore put the plaintiff to the proof of every averment in the declaration. As Sir F. Pollock has said, a defendant who adopted this course "said in effect, 'I admit nothing and want to see what you can make of it.'"⁶ Obviously the adoption of this course, whenever possible, was the wisest plan to pursue; and it was generally adopted. It was, says Runnington, "the uniform practice" in the action of ejectment, and in personal actions on mercantile contracts, such as insurances and bills of

² Hale, H. C. L. 212 n.

³ Stephen, *op. cit.* (1st ed.), 179-81.

⁴ *Ibid.* 182-3.

⁵ *Ibid.* 278.

⁶ *Genius of the Common Law*, 37.

exchange; and it was very generally adopted in the action of *assumpsit*.⁷

It was perhaps not unnatural that the extended scope thus given to the general issue should have offended the scientific pleader. We have seen that Stephen's work on the principles of pleading, coming, as it did, at the close of a long period in which the rules of the art had been logically developed by the Courts, had done more than any other work to demonstrate the scientific character of its principal rules.⁸ Though he admits that the system of special pleading had its defects, the whole tendency of his work is to minimize them, and to insist on its strong points, as compared with the methods adopted by other systems of law to bring cases before the Courts.⁹ He is inclined to reserve his severest animadversions for pleas like the general issue, which did not conform to the principles of the science, and restricted its scope.¹ Nor was it difficult to make a plausible case against the extended scope which had been given to the general issue, for, though it was by far the most efficacious remedy for the evils of the system of special pleading, it had its defects. The issue was not clearly defined. Issues of fact were not distinguished from issues of law, and the parties did not know exactly what were the issues of fact upon which the case really turned. It followed from this that the parties incurred expense by reason of the "unnecessary accumulation of proof," often of facts which turned out at the trial to be undisputed. Moreover, the questions of law which arose were not argued, as they would have been argued on demurrer, before the Court *in banc*, but before a single Judge at *nisi prius*, who had no previous intimation of the point and no adequate opportunity to refer to the authorities. Hence applications for new trials were multiplied.² What Stephen did not see, and what perhaps he could not be expected to see, was that these defects were small in comparison with the enormous risk that, in cases where the parties specially pleaded, the action would be decided

⁷ Hale, H. C. L. 212 n.

⁸ Above, 263.

⁹ See especially his concluding chapter.

¹ Thus, *op. cit.* 181, speaking of the extension given to the plea of *non assumpsit*, he points out that the effect is that "in an action which has become of all others the most frequent and general in its application, the science of pleading has been in a great measure superseded by an innovation of practice which enables the parties to come to issue before the plea (the second step in the series of allegations) in a great variety of cases which would formerly have led to much remoter or more specific issues."

² This is, in effect, a short summary of the Second Report of the Commissioners on Courts of Common Law, *Parlt. Papers*, 1830, vol. xi. 45 *seqq.* This part of the Report is also printed in Stephen, *Pleading* (5th ed.), lix.-lxvi.

without any reference to the substantial merits of the case. This truth was, as we shall now see, completely proved by the new pleading rules of the Hilary Term, 1834.

The New Pleading Rules of the Hilary Term, 1834.

It was these views of Stephen which inspired these new pleading rules. He was one of the Commissioners appointed to consider the practice and procedure of the Courts of Common Law; and it is clear from their Second Report, which was issued in 1830, that he had brought round his fellow Commissioners to his views on the subject of special pleading. In that Report the defects of the system of special pleading are minimized,³ and the evil results which flowed from the extended scope allowed to the general issue are exaggerated. The recommendations of the Commissioners on the subject of pleading were left to the Judges to carry out, and they were directed by the Legislature to make and submit to Parliament what alterations they saw fit.⁴ The Judges, with the acquiescence of Parliament, adopted the recommendations of the Commissioners, and a principal effect of their new rules of the Hilary Term, 1834, was to restrict drastically the scope of the general issue.⁵ For instance, the plea of *non assumpsit* was for the future to operate only as a denial of the promise, so that, "in an action on a warranty, the plea will operate as a denial of the fact of the warranty having been given on the alleged consideration, but not of the breach; and in an action on a policy of insurance, of the subscription to the alleged policy by the defendant, but not of the interest, of the commencement of the risk, of the loss, or of the alleged compliance with warranties." In actions on bills of exchange and promissory notes the plea of *non assumpsit* was wholly excluded. In all actions of *assumpsit* all matters showing that the transaction had been discharged, or was void or voidable—*e.g.*, fraud, infancy, coverture, release, payment, performance, illegality—must be specially pleaded. The plea of *nil debet* was abolished.

³ "We conceive that considerable misapprehension popularly prevails upon the subject of *special pleading*. That system was characterised no doubt, at former periods of our legal history, by a tendency to prolix and tautologous allegation, an excessive subtlety, and an overstrained observance of form; and notwithstanding material modern improvements, it still exhibits too much of the same qualities. These its disadvantages are prominent and well understood; its recommendations are, perhaps, less obvious, but when explained, cannot fail to be recognised as of far superior weight": Parlt. Papers, 1830, vol. xi. 45.

⁴ 3 & 4 Will. IV. c. 42, s. 1; Stephen, *op. cit.* pref. to the 4th ed.

⁵ Those of the rules which deal with this matter will be found in Stephen, *op. cit.* (5th ed.), lv.-lix.

In actions on the case the plea of "not guilty" was to operate as a denial only of the breach of duty or wrongful act alleged, and all other pleas in denial must be specially pleaded. Thus, in an action on the case for obstructing a right of way, the general issue only denied the obstruction, and not the plaintiff's right of way; and in an action for conversion it denied the conversion only, and not the plaintiff's title to the goods. In trespass *quare clausum fregit* the plea of "not guilty" only operated to deny that the trespass had been committed in the place mentioned, and not that the plaintiff was in possession or had a right to possess that place. If it was wished to deny these facts, these must be a special traverse.

The Commissioners in 1830 admitted that there might be some objection to this extension of the system of special pleading, and anticipated some difficulties as to the settlement of the proper forms of pleas. But they considered that "the principles of the science of pleading have been so successfully cultivated, and are at the present day so well understood, that the extent of such embarrassment would probably be small, and we should expect the whole law on this subject to be permanently settled within a short period, and at the expense of a few adjudged cases."⁶ That was, in effect, the view of Stephen, and never was a more disastrous mistake made. The broad effects of the new rules were exposed in a witty dialogue entitled, "*Crogate's Case: A Dialogue in the Shades on Special Pleading Reform*," which was written by Serjeant Hayes, afterwards a Judge of the Court of Queen's Bench. This dialogue has been described by Sir F. Pollock,⁷ so that it is only necessary to say here that the parties to it are Crogate, who gave rise to the case reported in 8 Co. Rep. 66, and Baron Surrebutter, whose original is Baron Parke, afterwards Lord Wensleydale; and that the main part of the dialogue is taken up with the vain efforts made by Baron Surrebutter to make Crogate see the justice of the decision in his case. It not only explains very clearly how the new pleading rules had led, as Sir F. Pollock says, to "an outbreak of new technicalities," but also contains an excellent summary of the weak points of the old system of special pleading.

The following passage contains an excellent summary of some of the effects of the new rules: "*Crogate*. Oh! you've been making new rules about pleading, have you? then I suppose, as a matter of course, that you've pretty nearly done away

⁶ Parlt. Papers, 1830, vol. xi. 51.

⁷ *Genius of the Common Law*, 27-34.

with the whole thing. *Surrebutter, B.* Done away with special pleading? Heaven forbid! On the contrary, we adopted it (subject to the relaxation introduced by the Statute of Anne) in even more than its original integrity; for we have enforced the necessity of special pleas in many actions in which the whole case was previously left at large, on the merits under the general issue. And we framed a series of rules on the subject, which have given a truly magnificent development to this admirable system; so much so, indeed, that nearly half the cases coming recently before the Court, have been decided upon points of pleading. *Crogate.* You astonish me But pray, how do the suitors like this sort of justice? *Surrebutter, B.* Mr. Crogate, that consideration has never occurred to me, nor do I conceive that laws ought to be adapted to suit the tastes and capacities of the ignorant.⁸ At first, to be sure, we found that in consequence of our having restored the ancient strictness of pleading, when it had been relaxed, and applied it to several of the most common forms of action to which it had never previously been applied, plaintiffs were put into considerable perplexity by special pleas. If they denied too much a demurrer for duplicity followed; and if they only denied one point, and consequently admitted the rest, they sometimes traversed the only allegation which could be proved, or, to use your language, they took the wrong sow by the year. In this state of things, though justice was by no means uniformly defeated, yet this result took place more frequently than was convenient, and some obloquy was beginning to attach on the new rules. In this emergency, Mr. Crogate, we fell back on the replication *de injuria* with the happiest success. . . . And thus we were enabled to bring the system of pleading as near to perfection as I believe to be possible.”⁹ Very few persons

⁸ This sentiment put into the mouth of Baron Surrebutter may seem extravagant; but that it is not can be seen from the view expressed by Lord Redesdale in his tract on the Chancery Commission of 1826. “Whoever,” he said, “considers the administration of justice by courts of civil jurisdiction of any description with a view only to the personal interests of the parties engaged in litigation has taken a very imperfect view of the subject. In very few cases comparatively ought the parties litigating to be considered as the only persons interested in the result”: Parkes, *Chancery*, 520, citing *The Times*, August 31, 1826.

⁹ Compare this with the finding of the Common Law Procedure Commissioners: “So long as in the three principal kinds of actions, viz. *assumpsit*, debt on simple contract, and trespass on the case (which constitute a very large majority indeed of all the actions which are brought) it was competent for the defendant to raise almost all defences under the old plea of the general issue, the evil was not so much felt. . . . But when the new rules compelled the use of special pleas in these actions, the technical and formal defects of the system . . . became extended to all (actions), and the inconvenience was increased in proportion. Special demurrers for want of form, and for objections of a technical nature, were much increased. From the necessity of specially pleading all defences to actions in most general use,

will be found to question the justice of the judgments which Hayes makes Radamanthus give against Surrebutter, B., and Edmund Saunders, though they may sympathize with the astonishment of these eminent pleaders at the neglect which these judgments showed of the most elementary rules of pleading.

*The Effect of the New Rules on the Development of
Substantive Law.*

We are now in a position to understand the question raised by this paper: Did these new rules affect the development of the substantive law in the nineteenth century? Now it is clear that the increased strictness in pleading which came with these rules necessitated an increased attention to the scope of, and distinctions between, the forms of action which the rationalism of the eighteenth century had tended to obscure; and obviously this led to a tendency to revert to older cases of the sixteenth and seventeenth centuries, in which the scope of, and the distinctions between, these forms of action had been more clearly grasped and expounded. It seems to me that there are three bodies of substantive common law doctrine in which, in the nineteenth century, this tendency to revert to older cases was marked: (1) Developments in the doctrine of consideration; (2) the development of the distinction between trover and trespass *de bonis asportatis*; and (3) the scope of the modification of the rule *actio personalis*, etc., established by the judgment of the majority of the Court of Appeal in *Phillips v. Homfray*.¹ I do not assert that these developments were consciously the result of these new pleading rules; but I think that the fact that these rules required lawyers to scrutinize more carefully than before the nature and scope of the forms of action tended to make the Courts much more ready than they had been in the eighteenth century to rely on older cases, and that this habit of mind caused a reversion to a stricter and an historically more accurate statement of common law doctrine. Let us glance rapidly at these three instances:

(1) There is no doubt that during the latter part of the eighteenth and the earlier part of the nineteenth centuries there was a strong tendency to accept moral obligation as a valid con-

new pleas were introduced; and defendants who had no real defence availed themselves of a chance of a temporary success by pleading subtle and tricky pleas to invite special demurrers for the mere purpose of delay": *Parlt. Papers*, 1851, vol. xxii. 20.

¹ (1883) 24 Ch. D. 439.

sideration.² In 1802 the reporters Bosanquet and Puller in a very learned note which they appended to their report of the case of *Wennall v. Adney*³ showed that this doctrine was inconsistent with the earlier authorities, and was unnecessary for the decision of most of the cases usually cited in support of it. The use made of this note in later nineteenth-century cases shows that it had much to do with the change of opinion on this subject.⁴ But it was not till Lord Denman's decision in 1840 in the case of *Eastwood v. Kenyon*⁵ that the view that moral obligation could be a consideration was finally overthrown. He said,⁶ "In holding this declaration bad because it states no consideration but a past benefit not conferred at the request of the defendant, we conceive that we are justified by the old common law of England. . . . Hobart, C.J., lays it down [in *Lampleigh v. Brathwait*] that 'a mere voluntary courtesy will not have a consideration to uphold an *assumpsit*. But if that courtesy was moved by a suit or request of the party that gives the *assumpsit*, it will bind; for the promise, though it follows, yet it is not naked, but couples itself with the suit before, and the merits of the party procured by that suit; which is the difference'; a difference brought out fully by *Hunt v. Bate* (Dyer, 272a). . . . The distinction is noted, and was acted upon, in *Townsend v. Hunt* (Cro. Car. 408), and indeed in numerous old books; while the principle of moral obligation does not make its appearance till the days of Lord Mansfield." It is clear that there is a reversion to "the old common law," which is exactly what we might expect from lawyers who, having been compelled to give increased attention to the pleas appropriate to *assumpsit*, were compelled to study the procedural basis of the doctrine of consideration. It is true that in *Eastwood v. Kenyon* the plea was the general issue; but this hardly affects the indirect effects upon the minds of lawyers of the need to study the procedural basis of the doctrine in the cases in which, under the new rules, this plea was not available. At any rate it is clear that, since the decision in *Eastwood v. Kenyon*, the doctrine of consideration has been developed on strictly historical lines, and entirely in accordance with those older sixteenth and seventeenth century precedents which regarded the term "consideration" as the compendious word which summed up the conditions which

² See a paper by the present writer in the Boston University Law Rev. ii. 186-195.

³ B. & P. 249.

⁴ Boston University Law Rev. ii. 197-198.

⁵ 11 Ad. & E. 438.

⁶ At p. 452.

a plaintiff must satisfy before he could succeed in *indebitatus* or in special *assumpsit*.

(2) The question of the proper line of demarcation between trover and trespass *de bonis asportatis* has been a subject of controversy right down to modern times. Even in the seventeenth century there are several cases in which it was laid down very broadly that trover would always lie for a taking.⁷ In the eighteenth century the current of authority ran even more strongly in the same direction. In 1756, in the case of *Cooper v. Chitty*, Lord Mansfield said that "when the defendant takes these (the goods) wrongfully and by trespass, the plaintiff, if he thinks fit to bring this action (trover), waives the trespass, and admits the possession to have been lawfully gotten."⁸ Blackstone seems to have thought that trover would in all cases lie for an unlawful taking.⁹ Serjeant Williams, in his note to Saunders' report of *Wilbraham v. Snow*, summed up these authorities in the statement that, "Whenever trespass for taking goods will lie; that is, when they are taken wrongfully, trover will also lie; for one may qualify but not increase a tort."¹ It is not surprising that this *dictum*, thus supported, secured a following in the nineteenth century. Parke, J., was of this opinion in the case of *Norman v. Bell*.² It would seem that Martin, B., in the cases of *Burroughes v. Bayne*³ and *Hollins v. Fowler*,⁴ was inclined to take a similar view; and it has secured the adhesion of Sir John Salmond.

But both in the seventeenth and eighteenth centuries there is authority for the proposition that an asportation does not necessarily amount to a conversion, and that, unless it amounts to a conversion, trover will not lie. Thus in 1682, in the case of *Put v. Rawsterne*,⁵ it was said that, "sometimes the case may be

⁷ *Bishop v. Viscountess Montague* (1601) Cro. Eliz. 824; Cro. Jac. 50; *Levison v. Kirk* (1610) Lane, at p. 68; *Kinaston v. Moor* (1627) Cro. Car. 89; *Hodges v. Sampson* (1662) W. Jones, 443; *Bruen v. Roe* (1665) 1 Sid. 264; 3 Salk. 365.

⁸ 1 Burr., at p. 31.

⁹ "If a man take the goods of another out of his actual or virtual possession, without having a lawful title so to do, it is an injury . . . for which an action of *trespass vi et armis* will lie; or if committed without force, the party may, at his choice, have another remedy in damages by action of *trover* and *conversion*"; Comm. iii. 150.

¹ 2 Williams Saunders, 47.

² (1831) 2 B. & Ad., at p. 192.

³ (1860) 5 H. & N., at p. 303.

⁴ (1872) L. R. 7 Q. B., at p. 616: "But as regards the action of trover I think it is well settled that the assumption and exercise of dominion—and asportation is an exercise of dominion—over a chattel inconsistent with the title and general dominion which the true owner has in it and over it is a conversion, and that it is immaterial whether the act done be for the use of the defendant himself or of a third person." See the criticisms of Brett, J., on this *dictum* in S. C. L. R. 7 H. of L., at pp. 780-783.

⁵ Th. Raym. 472.

such, that either the one or the other action will lie; as when there is a tortious taking away of goods *and detaining them*”—clearly the taking away is not by itself regarded as sufficient. Shepherd's book on actions on the case, published in 1675, indicates that the law was in an uncertain state; but his words show that it could not be broadly asserted that in every case of taking trover lay.⁶ Though in the eighteenth century there was a tendency to allow trover to be brought in every case where an asportation could be proved, in at least one case the contrary view was taken.⁷ It will be found moreover that in most, if not all, of the cases in which it was laid down that trover will lie for a taking, the taking was of such a kind as to amount to a conversion. Therefore the broader propositions to be found in them are merely *dicta*; and the statements made by Blackstone and Serjeant Williams, which are founded upon these *dicta*, are entitled to no greater weight.

It was therefore almost inevitable that when, in the latter part of the nineteenth century, the nature of the different causes of action began to be more closely scrutinized, the line of cases which distinguished a conversion from an asportation, and held that an asportation does not necessarily amount to a conversion, should be followed. The distinction between an asportation which does and an asportation which does not amount to a conversion was clearly drawn in 1841 in the case of *Fouldes v. Willoughby*;⁸ and the law laid down in that case was accepted by the House of Lords in the case of *Hollins v. Fowler*.⁹ Here again, therefore, we have a reaction from the looser reasoning, and almost pointed disregard for the differences between the forms of action which had characterized many of the eighteenth-century decisions.

(3) With the third illustration—the scope of the modification of the rule *Actio personalis moritur cum persona* introduced by the judgment of the majority of the Court of Appeal in *Phillips v. Homfray*¹—I can deal more briefly. That case decides that the representatives of a deceased person can be made liable for a wrong committed by the deceased, if and in so far as that wrong consists in the taking or detention of property or its proceeds which has enriched his estate, but not for any other benefit

⁶ “It is held by some that in most cases where a man hath taken my goods into his possession as a trespass, so that trespass lieth for the wrong . . . that if I will I may demand the thing; and if the party refuse to deliver them, that there be a conversion in the case,” at p. 28.

⁷ *Bushel v. Miller* (1718) 1 Stra. 128.

⁸ 8 M. & W. 540.

⁹ L. R. 7 H. of L. 757.

¹ (1883) 24 Ch. D. 439.

resulting from his wrongdoing. I have elsewhere shown that this rule is probably derived from the rule that detinue lay against executors in their representative capacity for property wrongfully detained by a deceased person; that, owing to the fact that detinue had, in the eighteenth century, been largely superseded by *assumpsit*, there was some uncertainty as to the extent of the modification; but that the definition of the extent of the modification by the majority of the Court of Appeal represents its extent as shaped by the action of detinue more correctly than its extent as shaped by the action of *assumpsit*.² Bowen and Cotton, L.JJ., expressly based their decision on "the classifications of the forms of action known to English law."³ Here again, therefore, we have a reversion to older common law principles, which is the more remarkable as it occurred some years after the introduction of the new system of procedure and pleading inaugurated by the Judicature Acts. But on that account it is perhaps a more striking instance than the other two of the permanent influence on the mind of the lawyers of the increase in the strictness of pleading which came with the new rules of 1834.

It follows that this influence of the new rules of pleading was not a direct or a conscious influence; and for that very reason it may have been all the more powerful and lasting. It is certainly remarkable that in these three instances there was a tendency to abandon lines of development which had commended themselves to eighteenth-century lawyers and to revert to earlier lines of decision. If one instance only could be adduced, it might be dismissed as an accident; but the existence of three instances prevents us from adopting this hypothesis. Rather, it points to the existence of some cause which made it necessary for the lawyers to go back to older decisions. Now it is clear that the new rules of pleading, which required the lawyers to distinguish with greater strictness than before between the forms of action, would be likely to have this effect; for it would compel lawyers to revert to authorities which defined accurately the scope of these forms; and these authorities would be found more easily in the earlier than the later periods, because in the earlier periods the distinction between these forms was more firmly grasped and more rigidly enforced. Though, therefore, I do not assert that this was the only cause which produced these nineteenth-century developments of the common law, though I

² Hist. Engl. Law (3rd ed.), iii. 579-582.

³ 24 Ch. D., at pp. 455-6.

do not assert that it was a cause of which the lawyers were conscious, I think it was an indirect and an unconscious cause, operating through the legal training which it made compulsory on all common lawyers. If it be so, it is a very late instance of a phenomenon which is constantly meeting us in legal history—the wide and often unexpected results which changes in the law of procedure may have on the development of substantive law.

W. S. HOLDSWORTH.

F. W. MAITLAND.¹

AT the beginning of the '70s there were two Maitlands at Trinity. One of them took a first class in Law—the other took a first class in Moral Sciences. The latter was our Maitland, and thereby hangs a tale. It was natural, when in later years he became a distinguished man, for people to look up the academic records, and equally natural for them to fall into the error of supposing that the Maitland who was the distinguished legal historian was the Maitland who “went out” in Law. Even the then editors of the University Calendar fell into the trap, and in the Calendars from 1898 to 1901 there is a note to the name Maitland in the Law Tripos, 1873, describing him as Downing Professor of Law. Other people were misled. Whittaker, of Trinity, whom many of us know to have been an old pupil and intimate friend of Maitland, told me that not long ago he met one of the men who were classed above the Maitland of the Law Tripos. Both being Cambridge men and lawyers they talked, of course, of Cambridge and Law and Maitland. The other man observed, “After all, it will always be a feather in my cap that I once beat Maitland in examination”; and Whittaker had not the heart to undeceive him.

In those days Fellowships, except in Classics and Mathematics, were rather rare, but in 1875 Trinity offered a Fellowship in Philosophy. There were four candidates: James Ward, the present Professor of Mental Philosophy; William Cunningham and Maitland, who had been bracketed at the head of the Moral Sciences Tripos, and A. T. Lyttleton, who, like all the others, had been at the top of that Tripos. It was a strong list. Ward became the acknowledged leader of Psychology in this country. Cunningham gained a world-wide reputation as an Economic historian, Lyttleton became Master of Selwyn and Bishop of Southampton, and what Maitland became we know. The electors chose Ward. Cunningham became a Fellow some years

¹ Read at the Annual Meeting of the Society of Public Teachers of Law at Cambridge, 1921, and in part at a meeting of the Cambridge University Law Society

later. Maitland never became a Fellow of Trinity, but was made an Honorary Fellow in 1902 or 1903. No doubt the electors chose wisely, and though at first sight it looks something of a puzzle that no Fellowship was available for a man of Maitland's calibre, it was much more explicable under the conditions of those days than it would be now. But as things turned out we may be glad that he was not elected. He would probably have devoted himself to philosophy. Cambridge might have lost Ward, who would perhaps, as Seeley put it in another connexion, "have ended ignominiously in a large practice at the Bar"; and we should have lost the greatest legal historian of our time—and we nearly did lose him. He left Cambridge and went to the Bar. He read in chambers in the ordinary way, devilling after his pupilage for, amongst others, Bradley Dyne. A pleasant story told me by Whittaker shows that, devoted as he was to his work while in chambers, he was quite prepared *desipere in loco*, and to regard even chambers as a suitable *locus*. It is recorded that there was a regular ritual on certain occasions. When Maitland had been digging into conveyancing papers in Dyne's chambers till he thought he had done enough, he would get up and ring the bell. When the clerk appeared Maitland would say: "George, bring me Equity 2." George, after a moment's hesitation to make it certain that he had grasped the true purport of the order, would retire, and return in a minute or two with, not Equity 2, but the morning's *Times*, with which the future Downing Professor spent the next hour.

But we regained him after all; though for this we can hardly, as a University, claim the credit. But for Henry Sidgwick, he would, no doubt, have come to the deplorable end indicated by Seeley. He was a favourite pupil of Sidgwick's, and a close friend. Knowing the ability of the man, and realizing what a loss to scholarship his absorption into practice would be, Sidgwick offered the University a sum of money to endow a Readership in English Law for five years. It was a very generous act, its doer was a very generous man; and it was not less wily that it was generous, for Sidgwick quite well knew that, when once the University had Maitland in an official post here, they would not lose him again. As it turned out, he did not hold the Readership very long, for on the death of Professor Birkbeck in 1888 he was elected into the Downing Chair, which he held till his death.

When Maitland came back to Cambridge I was past my Tripos, so that I was not his pupil in any academic sense.

Indeed, I do not think I ever heard him lecture. But he made his business to get into touch with the young men, and very soon gave me an opportunity of making his acquaintance. I was rather afraid of him in those days, and I am almost ashamed to say that when on one occasion he suggested my doing some piece of work I declined it; I forget on what excuse. But the real reason was that I feared I should not do it well enough to satisfy him. I know now that what would have happened would have been that the merit of the work would have been his, and I should have got the credit. It was characteristic of him that, when Felix Liebermann came to Cambridge for an honorary degree, Maitland gave a dinner in his honour, to which he invited, unless my memory misleads me, almost exclusively young men, many of whom would have had little other chance of meeting him, except possibly in a large assembly.

Though I never went to his lectures, I learnt from him more than any lectures could teach. He was the sort of person whom one could not talk with for five minutes without learning. That does not mean that he was always pouring out information, but that to talk with him on whatever indifferent subject was to see many unexpected aspects of the matter suddenly illuminated. It was rather a humiliating experience; but it was as little humiliating as it could be, because Maitland generally managed to leave you with the impression that you yourself had been illuminating the matter. It was not till later that the painful truth was on reflection revealed to you.

Though he had the acutest intellect that I ever came across, I should not describe him as an "intellectual," because that name carries to me a faint suggestion of priggery, and Maitland was anything but a prig. He never pretended to undervalue those aspects of life which are not purely intellectual. He thoroughly enjoyed a good dinner, though it was observable, at least in later years, that his share in the feast was rather aesthetic than material. He did not eat a great deal; but he realized the charm of a well-laid table, dainty meats, and all the accessories, and his table talk was delightful. On one occasion, while I was with him in Canary, we had reached Teror, a remote village, where few but natives were ever seen, and we badly needed food. Between us we had barely enough Spanish to order a meal, but we got one at last. It was quite toothsome, but entirely unintelligible; and it prompted him to a discourse on the foods of different peoples and their effects on character which, if I could reproduce it, would be much more edifying and much more entertaining than I can possibly be.

His attitude towards the pure "intellectuals" was well illustrated by the glee with which he used to tell a tale about his master Sidgwick, well known, but perhaps not to all the younger generation. A foreign scholar one night in Trinity—I suppose a German; at any rate, with thoroughly German taste—was depreciating our English scholarship. He said: "Why, you have not even an English equivalent for the words *Gelehrter* and *Savant*!" "Oh, yes, we have," said Sidgwick with his curious and effective stammer, "we call them p-p-prigs." We must not think of Maitland as nothing but a scholar. As an undergraduate he was a prominent athlete—a three-miler Blue. He rowed in a winning Third Trinity boat, and Fisher tells us "the boat dined in Maitland's lodgings over Palmer's bootshop, and kept up its festivities well into the morning." It is possible that that last statement is a libel; we must remember that Fisher is an Oxford man, unacquainted with the austerities of Cambridge. The nature of the sports he preferred gives an indication of the character of the man. They both involve long and continuous effort. Even in Rugby football there are moments of rest; and it would not appeal to him, though I do not think it was much played here in those days. It was the same with cricket. I remember sitting with him once in the Downing grounds watching for a time the progress of a match. He looked at it with some curiosity, as if he had not seen it before, and then, turning away, said: "Not much of a game, cricket—too much sitting about." In the same way in later years he took up cycling, not so much for amusement as for exercise; and I have always thought that its main attraction for him was that you could not loiter—if you did not keep moving you fell off. He first took to it, I think, when ill-health compelled him to winter in a warm climate. In Canary there were then very good roads, though there was no great length of them, and they had for him the peculiar charm that they were very hilly. One of them, the central road of the island, was twenty-three kilometres long and rose 3,000 feet in one unbroken climb. It was his ambition to ride up the whole of that, and I think I have heard that he did it. In the time when I was with him there he did not achieve it. He was as yet far from expert, and it was difficult to convince him that, if you were climbing a mile or two of hill, it was not wise to try to rush it. He always started off at his highest speed, and naturally did not get very far. In the next year his education was completed by Bennett, of Emmanuel, a real expert. But he was no mechanic; he was

almost as helpless with a spanner in his hand as I should be with a Year Book.

He was a great walker in his youth—a member of that distinguished body, the Sunday Tramps, whose history he tells in his *Life of Leslie Stephen*. In later life he seemed rather averse from walking; the natural suggestion would be that it was not strenuous enough. But the fact that it took a long time was another reason, and I have painful ground for supposing that there was yet a third. On one occasion in Canary we had been for a long cycle ride; and on our return, about three miles from home, we found that a heavy storm of rain had turned the usually dusty road into a bed of thick viscous mud, through which a bicycle could not be driven. But he persisted in shoving through it till he fell off. Finally, with great reluctance on his part, and quite a different feeling on mine, he agreed that we should stable our cycles in a cottage and walk home. When we got back he looked very surprised, and said: "Well, I have really enjoyed the walk"! Next day he explained to me that he commonly found the need of making talk during a walk very irksome; that he usually became very bored and had feared. He admitted handsomely that he had not been bored, a fact which may perhaps be due to my prudent realization of the truism that I should get more pleasure out of his remarks than he would out of mine, and thus was content to act as chorus. But I think that experience must be the reason why, in a letter written not long after to Dr. Jackson, he gave me a testimonial for being a good companion. Besides the carriage roads there were mule tracks; and we took our bicycles, sometimes shouldering them, over these into places where no cycle, or, indeed, any form of wheeled traffic, had ever been. In one village, Atalaya, the inhabitants of which live entirely to themselves in cave dwellings, we had the privilege of being formally stoned, as everyone is till he pays a few pence ransom. It was an odd experience in Canary, where the ordinary villager, away from tourist-ridden and demoralized Las Palmas, is a very courteous person. But there were places to which no bicycle could go—in particular, the Cumbres, the tops of the mountains, about 6,000 to 7,000 feet. On one occasion we made an expedition to these heights, stopping the night before at the highest hotel on the island, about 4,000 feet below. We had a good day on the summit, and then started for our homes, not much above sea level; but we had not quite realized what was involved in a descent of 6,000 feet down a mountain side with which we were not

familiar. We had one or two thrills, and we lost our way. We got very tired; and every now and then Maitland gave a loud groan or bellow, which at first alarmed me, for I supposed the labour was too much for him. But seeing this he explained—I think not merely to ease my mind, but with truth—that it was merely letting off steam, and he found it refreshing. Dark had fallen before we reached a little mountain village, Valsequillo, and after that it was plain sailing. We were very hot. There was an inn in the village. The conclusion from these premises is obvious. I had the pleasure of seeing Maitland enjoy a drink, and a very long drink. There was but one beverage, for the beer was undrinkable. This was vinovermouth, a mixture of the local red wine (*vino tinto*), which was sold, even to foreigners, at about sixpence a gallon, and is not worth so much, and cheap Spanish vermouth. The mixture is sold in litre bottles, and Maitland disposed of a bottleful immediately. To avoid misconception I had better say that I did the same. He finally reached home dog-tired, and early in the morning I went up to his house in some trepidation as to the effect of the fatigue on him. I found him in his garden, smoking and transcribing a page from a photographed Year Book, and looking perfectly fit. He told me he felt better than he had felt for months, and, as a matter of fact, he had no more illness that winter. Whether it was the vinovermouth or the unusual fatigue, I do not know. The expedition left a deep impression on his mind. A year or two later he was wintering in Madeira, and wrote to me: “I kept New Year’s Day by ascending into the mountains. Returning, missed train, and had in all a descent of 3,300 feet on well-polished cobbles. At the end of our day in the Cumbres such a descent would have tried the resources of our language.” And, again, a week or two later: “Was up in the hills yesterday as high as 5,300. Not comparable to Cumbres. Feet much knocked about by cobblestones. Fair thirst. Language occasionally. My thoughts went back to Valsequillo.” Though he tried Madeira, he always preferred Canary. In one letter from Madeira, after expatiating on the scenery there, he ended with the words: “But my heart is in Canary.” Partly his preference was for the people. In another letter, comparing the people, he says: “The Portuguese are nastier to ladies.” The journey to and fro was not always comfortable, especially the return; for while it was usually easy to get passage to Canary the return depended on the question whether there was accommodation on the boat, Canary being an intermediate port of call. And this

was sometimes uncertain till the boat arrived. It was worse when England was also an intermediate place of call. When after a shorter visit in a later year we returned together, Maitland, my wife, and I were put ashore together at Dover at three in the morning from a German boat, and had to wait four hours on and about Dover Pier for a train. He told me on that occasion something about German ideas of comfort. He had enquired of a kindly German resident on the island whether these boats were comfortable. The answer was: "Oh, yes! There is a band, and it plays at every meal." "Yes," said Maitland, "I daresay it is very splendid, but that is not quite what I mean. Is it really comfortable?" "Comfortable," said the German, "I should think it was! Why, they open a fresh cask of beer every day!"

In the winter which we spent with the Maitlands in Canary they were living in a house right in the middle of the village or town of Telde, with a very fine garden. We were living outside the village in a house which had no garden at all, but which had certain advantages. It was, in effect, a bungalow on the top of a banana packing store not in use, thus raised some twenty feet from the road level, and commanding a view of Telde across the river bed—it was not a river, for there was no water in it—about 100 yards wide, and spanned by a stately bridge, which started just below our house. The house had no windows. The only lights were through the doors, which thus were always open; and they gave on to the greatest charm of the house—a covered balcony or verandah, 100 feet long and at its narrowest twenty feet wide, on which we lived most of the time. From this we could see the bridge and the road up to the town. The postal arrangements in the interior of the island were very strange; and accordingly all our letters were addressed to the port, and thence sent on by messenger to the Maitlands. Every mail day we used to watch for Maitland, who, as soon as the letters came, used to mount his bicycle and bring down ours. As he approached the bridge he sounded his bell—that bell which plays a part in a grotesque episode recorded in a letter published in Fisher's book—and shouted, "Post! Post! Post!" till he had attracted our attention, much to the amazement at first, and afterwards to the amusement, of the local people who happened to be about. He never would let us come and fetch them, because, as he said, it was never certain when they would arrive, and he knew we should be glad to have them at once.

His liking for a long strenuous task was reflected in his work.

The first task he undertook when he devoted himself finally to research and teaching was *Bracton's Notebook*. It is three volumes of exact and laborious research, and it was done in the intervals of other work in two years. One can see what an attraction for him the work of editing the Year Books would have. Here was a task which could have no end at all, for no man could do it all in a lifetime. I am in no way qualified to deal with Maitland's work, but anyone can see what an amazing worker he was. His whole literary life was about twenty years. Other men, but not many, may have done as much in the time, though the list in the bibliography is appalling; but I do not know where I should look for the other man who has done so much, all of it, in the judgment of competent critics, of the highest quality; and it is to be remembered that for much of this time he was in ill-health, bound to be away from his books for a great part of the year, and taking his share, and more than his share, of the burdensome administrative work of the University when he was here.

Maitland had a keen sense of humour. He enjoyed a joke; but it had to be a pretty good joke, and there must be no offence in it. It is reported that, when someone made a vulgar joke in the hearing of Queen Victoria, she looked at the offender and said: "We are not amused." On such occasions Maitland said nothing, but his look was expressive enough. His playful spirit led him once to make an experiment which was not completed. In a certain well-known farce, "Box and Cox," the concluding words are, "And so, Box and Cox are satisfied," or something like this. Maitland wrote the chapter on the Elizabethan religious settlement for the *Cambridge Modern History*. In that time there were great disputes between Dr. Cox and the better-known John Knox. They were, indeed, more or less on the same side, but theologians do not need to be on opposite sides to quarrel. An adjustment was reached, and Maitland wrote: "And so, Cox and Knox are satisfied." What Lord Acton, at that time still conducting the history, would have said if the manuscript had come before him in that form, one would like to know, but, unhappily, Maitland struck out the sentence at the last moment. It is not necessary to dwell on his humour, partly because in A. L. Smith's lectures on Maitland so much is said on this side of him that the reader might almost think Maitland was a joker, and this he was not. He was an intensely serious man, but he was gifted with a sense of humour which constantly appears in his writings and gives him a lightness of touch which makes everything he

wrote, however unpromising the topic, eminently readable. It is a little unfortunate that the books of Maitland's to which the student is first introduced, the Constitutional History and the Equity, show little of the play of fancy and the humour which ornament his other work. They are there, but they are not prominent. But it must be remembered that these books were produced after his death from his notes with the assistance of notes taken by students whose names are a guarantee of fidelity. I take it that in the lecture, as delivered, there was more of this; but the oral contribution was not recorded, and his editors could hardly venture to add it. But an account of the religious settlement under Elizabeth, written as a contribution to a big book by many hands, does not look a very promising topic, and yet his chapter displays on every page the play of fancy and the charm of style which were peculiarly his. It would be easy to give examples of his earnest playfulness, his power of swift allusion, which brings illustration of his point from the most unexpected regions; but it can best be seen in his pages themselves, and no one will regret having made the attempt to find it. Signs of it can be seen in the Introduction to *Bracton's Notebook*, published so early as 1887. The delightful paragraph on page 103 of the first volume is an excellent specimen. It is too long to quote, but it is short to read; and if there be anyone here who has not read his Maitland I should like to think he will look up this passage and find his appetite stimulated. He will not regret it if he has any feeling for literature, and particularly if he is a Devonshire man.

And yet I do not think Maitland was one of those whose style was born with him. If you take up a juvenile work of Thackeray's, you can see, or you think you can see, who wrote it; but apart from some passages in the *Notebook*, it does not seem to me that Maitland's earlier writings show much of the characteristic Maitland style. You can, as it seems to me, trace the evolution of that style if you take up the three volumes of *Collected Papers*, which include matter written at various dates. But it was not long in appearing, and it was matchless when he reached his full strength. For exactness, lucidity, force, and charm, I do not know where to find a parallel among his contemporaries. It was as good a style as that of Thackeray—but I understand nobody reads Thackeray nowadays—and there is this difference. Thackeray can be, and has been, most successfully imitated, but the imitator of Maitland has a more difficult task. There was a weight of thought in what he wrote,

a substratum of profound learning to which Thackeray made, of course, no claim. But it is all handled so deftly that the reader is hardly aware of it. What Tennyson said of Lushington might well be said of Maitland:

“ Full of power as gentle; liberal minded, great;
Consistent, wearing all that weight
Of learning lightly, like a flower.”

Take, for instance, the essays from page 271 to page 404 of the third volume of the *Collected Papers*. They are dealing with a group of connected ideas. They show his ease of style to perfection. They are, for the most part, so simple that he who runs may read. Yet they deal with extremely difficult and disputed problems, and deal with them with such a mastery that only one who has made some sort of effort to go into the matter for himself will realize how profoundly thought they are, and what an amount of labour and reflection went to their making. A certain friend of mine who was usually opposed to him in University politics did not approve of Maitland's style. He said it was unrestful, and that he wrote to make verbal points. It appeared, however, that he had read only University flysheets and a few extracts quoted by other people precisely on account of their sparkling effect. Such things might not unnaturally give a false impression. So I lent him Maitland's *Life of Leslie Stephen*; and I am glad to say, for the honour of my College, that he recanted handsomely, and said that he found the book charming and the style consummately suited to the matter of the book.

Though he wrote many memorable phrases, he was not a phrasemaker. He chose a striking mode of expression, not because it was striking, but because for the purpose in hand it was the best. In fact, however, it is scarcely correct to say that he chose such and such an expression; it was the way in which the matter presented itself to his mind. “Persons who can never be in the wrong are useless in a Court of Law.” “Our corporation sole, a queer creature who is always turning out to be mere mortal man just when we have need of an immortal creature.” “The traveller who has studied the uncorrupted savage can often tell the historian of mediaeval Europe what to look for, never what to find.” “A dogma is of no importance unless and until there is some great desire within it.” These are not mere phrases; they are very weighty and concisely expressed truths. Maitland's writings are full of such things; all those cited are near together. Sometimes they are whimsically expressed, but they are never merely jocose; the mode

of expression impresses the point on the reader. No one but a convinced prig could take exception to them. Some have indeed done so, but it is permitted to think of them what Andrew Lang thought of those who said they "could not read Dickens or Scott."

Maitland had the curious delusion that he was not good at languages. The truth is that he was not interested in the study of Greek and Latin as it was taught at Eton, and in later years the small effort involved in acquiring modern languages colloquially was never worth while. A working knowledge of the classical tongues and the principal modern languages was necessary for his work, and this he had. He read Spanish easily, and when in Canary, unfit for work, he spent much time in reading Spanish literature. But he did not pick up colloquial Spanish; it was not necessary, since Mrs. Maitland and his daughters did it quickly and saved him the trouble. But when, for the purpose of editing the Year Books, it became necessary to master the very crabbed Norman French in which they are written, he not only did it without much trouble, but he went out of his way to put together, for the benefit of his successors, a grammar of that language. This grammar, published in his first Year Book volume, was received with acclamation by the philologists, and adopted, we are told, as a text-book in France. It was a surprising achievement for a man who was "not good at languages." But that was what he liked. To learn to talk freely meant merely talking, but to get at the grammar of a language, without help, meant stiff and continuous collar-work. Much of this grammar was prepared in Canary. In the course of the work it was necessary to determine what sound was indicated by various groups of letters. Some of them have survived into modern French with changed spelling, but possibly with similar pronunciation; and Maitland called on me to pronounce, as well as I could, all sorts of words, hundreds of them. My French not being of the finest quality, I fear the result may not have been very correct. It was the more distressing because there was a Swiss governess in the house whose native speech was French. Maitland explained, however, that he found it impossible to work with her, because she was so thickheaded that she could never understand what it was that he wanted her to do.

In the great University controversies about the beginning of the century—they were the same as those of recent times: Compulsory Greek and Degrees for Women—Maitland took a very strenuous part. In both cases he was on the then losing

side. In the discussions in the Senate he made very forcible speeches. I shall never forget the impression of his slight and graceful figure, with, oddly enough, a habit of somewhat awkward gesture, a figure and gesture which passed entirely from observation as soon as he was in full tide of speech. All that one could then see was his wonderful face. He looked at that time a youngish man, though he was nearing fifty; but his face was covered with a network of minute lines, too fine and delicate to be called wrinkles, and contributing not a little to the general impression of intellectual power and intensity of purpose. No single feature of his face ever seemed to be still. Every emotion expressed in his speech was reflected equally clearly in his countenance—contempt followed enthusiasm; intense conviction succeeded persiflage; humour, sweet reasonableness, pity, detestation, were as plainly visible as they were audible. But after a little time even his features faded—at least from the notice of one observer—and all that one could see, or, at any rate, note, was his wonderful eyes. All that one was conscious of was the flow of epigram, argument, and even invective, and the eyes. Only one other pair of eyes has ever seemed to me so to dominate the countenance. These were those of Cayley, very different in expression, for his were the eyes of a mystic (those of Westcott had something of the same character) but having the same dominating effect. It was in his speech on the proposal to allow women to take degrees that he gave one of his most effective strokes of ridicule. There was a suggestion of a women's university, which should be situated at some point within convenient reach of the two old Universities. The essence of his reply was that women would not be satisfied with this; that it could be no more than a temporary makeshift. But, of course, he did not put it as baldly as this. What he said was something like: "Do you think they will stay there? No, it will be Bletchley Junction Academy, where you change for Oxford and Cambridge." No more was heard of that, and it will be remembered that in the recent controversy the supporters of an independent women's university did not revive it; the women's university was to be at Cambridge.

In his speech on Compulsory Greek he made a remark which gave some offence. It seemed to him that a good deal of the opposition of classical men in Cambridge indicated that, in their enthusiasm for the study to which their lives were devoted, they were ignoring the general interests of education, of the University, and of the country. Classics, they thought, would

disappear from school curricula, with the inevitable result that there would be less classical study in the University, less opportunity for men to make a career in classics, and an inevitable inferiority of this country as compared with others in this field of scholarship. He compared them to the silver-smith Demetrius, who opposed the Christians at Ephesus, and he quoted the words: "so that not only this our craft is in danger to be set at naught, but also that the temple of the great goddess Diana should be despised and her magnificence should be destroyed." Now it is obvious that this admits of a rather sordid interpretation—that is to say, that the primary interest of these opponents was not in classics themselves, but in the prospects for their own pockets. Naturally there was some resentment. It was not so understood by all hearers, and I do not think it was so meant by Maitland. What I think he meant—it is, I think, perfectly true—is that no body of men, however instructed and highminded, can form an impartial judgment upon a proposal which, however it is looked at, and whatever its advantages, is really an attack in some sort on what they most cherish. He may also have meant—and this, too, is, I think, undeniable—that the existence of a private pecuniary interest actually does bias the judgment, though the person concerned may be quite unconscious of the fact. So stated, the proposition does not seem so open to objection. But I think, though it is very difficult for me, and very audacious, to take exception to anything which Maitland said, that it would have been better for once if he had not been so incisive. The Greeks won; it was only in our own time that the fortress was stormed.

If it is difficult for me to disagree with anything said by Maitland; it was equally difficult for him to disagree with anything said by Sidgwick. As he tells us, it was almost by accident that he found his way as an undergraduate to Sidgwick's lecture-room and became at once an ardent disciple of a man whom he calls a "supreme teacher." Sidgwick has many claims on our affectionate admiration; to have earned the intense devotion of such a man as Maitland is a sufficient testimonial; to have inspired such a man as Maitland is not the least of his claims. I think, though it must be a mere guess, that the strenuousness with which Maitland fought practical questions was itself an inspiration of Sidgwick. On one occasion, when he was talking about Sidgwick, I asked him how it was that Sidgwick, who in writing and teaching was the most cautious of men, who in dealing with philosophy hardly

ever expressed a judgment without a saving clause, whose strongest affirmation in book and lecture was, "I am inclined to think," was in matters of University controversy one of the most dogmatic of men, sometimes almost truculent. He at once gave me the explanation, derived, I imagine, from Sidgwick himself: "In matters of science, in questions of history or any other controversy among scholars, no man is bound to have an opinion: on questions of philosophy, and especially ethics, he is indeed bound not to have a very decided opinion, when, as is usually the case, there are many unknown or half-known factors. But it is otherwise in the controversies of practical life. There, action is always in view—one thing or the other is going to be done. In such a case it is a man's duty to make up his mind. When he has decided, on all the factors known to him, carefully sought for and carefully considered, which of the conflicting courses of action is most likely to be right, he is bound to use his utmost endeavours to secure the doing of what he thinks—though he cannot certainly know, but what he thinks—to be the right thing, as opposed to what he thinks to be wrong." It often occurred to me afterwards that Maitland had taken that lesson to heart.

This strenuousness in University business naturally led to occasional conflicts of opinion, for Maitland was not the only man in the University who was *tenax propositi*. Upon one occasion Maitland had, as a colleague on the General Board of Studies, another friend of mine who also had his own views as to what was worthy of encouragement, and between whom and Maitland there was as little in common as there could well be between two distinguished scholars, both highminded men and both heartily devoted to the advancement of learning. I asked my friend how he got on with Maitland on the General Board. He lifted his two hands towards heaven and said: "Oh, Maitland!" Then something prompted me to ask Maitland how he got along with this friend on the General Board. To my intense but carefully concealed amusement, he lifted both hands towards heaven and said: "Oh, Swete!"

It was one of Maitland's charming qualities that, when once he had made up his mind that a man was an honourable man, or a good scholar, or in any other way deserving of encouragement, it was next door to impossible to effect any alteration in his judgment. It was not merely that he was perfectly loyal to his friends, though, of course, that also was true, but that if he had formed an opinion favourable to a man, whether he knew him or not personally, it became very hard for him to

believe in any subsequently transpiring facts which seemed to suggest a different judgment. They were admitted to his consciousness with extreme reluctance, and even then were always thought of as possibly admitting of a favourable interpretation. I remember one case in which he was very slow to convince, and really suffered greatly in the process of revising his judgment. On the other hand, he certainly had his prejudices. He disliked ecclesiasticism, and, on the whole, for him the presumption was against a clergyman. But this did not prevent him from having a deep respect and admiration for Bishop Stubbs and Bishop Creighton, and for many distinguished residents in Cambridge in his time, whom I may not name, for some of them are still with us. But I once saw him behave with something very like rudeness to a poor man whose only offence was that he was a rather exceptionally parsonic parson. And he had no tolerance to spare for pretended and windy learning. He would speak very freely about some great names. One writer in particular, still living and in a high position, he often spoke of, more in sorrow than in anger, as a sort of national literary misfortune: a judgment which seems to me mistaken. Everybody knows what a poor opinion he had of John Austin. Indeed, where he saw defects in scholarship he was rather blind to real merits. He saw that Austin was not really a master of either English or Roman law, and he saw also that the main ideas expressed by Austin were all the work of predecessors. Accordingly he arrived at the opinion which he expressed in the equation— $J. A. = 0^2$. I cannot but think that this is to ignore the real significance of Austin. Austin did, once for all, as Bentham had not wholly succeeded in doing, compel attention to the actual facts of the modern English conception of law, and drove from our books the half-thought-out matter which served for a philosophy of law in this country under the influence of Blackstone. No doubt the doctrines of Natural Law have been revived in our own day—some of us do not admire them even in their new form—but they are a very different matter from the philosophy of Blackstone. One cannot justly ignore a man who so influenced thought as Austin did. One of the most notable men of my acquaintance, not a lawyer, has told me that of the half-dozen books which influenced him most in his youth Austin's *Lectures on Jurisprudence* was one. In like manner, and, I suppose, for the same reason, Maitland undervalued Maine. Maine was not exact or profound either as a lawyer or as an historian. Much of what he says of Roman law is misleading. So is much of what he says of mediaeval

law. Maitland saw this, and did not give, as it seems to me, enough weight to Maine's merits and achievement. He did not give him enough credit for directing men's minds at a time when historical research attracted few men in this country, and historical research in comparative law few men anywhere, to the problems to be solved and to the interest of comparative law. Even the beauty of his exposition, which had so much to do with his influence, was obscured to Maitland because of his inaccuracies. He did not, again, recognize that Maine was a great force, whose influence, unlike Austin's, spread beyond English-speaking countries. Girard, in his earlier editions, though he is quite alive to the weaknesses of Maine—he calls his work "*un peu flottant et superficiel*"—yet remarks that his writings "*ont beaucoup contribué à attirer chez nous l'attention sur la science nouvelle.*"

Maitland's helpfulness and generosity to younger students is so well known as to call for no mention. In a young man, if he thought that encouragement in research work was good for him, he was very tolerant of slips, and even ignorances. I remember on one occasion, shortly after I first knew him, he asked me a question about Roman law in a letter. The point seemed fairly simple, and I sent him an answer, for which he wrote and thanked me. A day or two later, looking again at his letter, I observed with shame that I had quite missed the point and had not answered the question he asked, but only a very simple part of it, on which he was in no need of information. I wrote at once with humble apology for my stupidity, and answering as best I could his real enquiry. In his acknowledgment he thanked me for solving a puzzle which had been troubling him for a long time, and he made no reference whatever to my earlier unhappy effort. I do not think there are very many men who in such a case would have refrained from making some allusion to it.

He was a keen musician in the sense that he had a critical appreciation of music, though I do not remember ever seeing him actually perform on any instrument. Mrs. Maitland was an accomplished violinist, and there was always good music to be heard at their house. But though he was an admirer of classical music, even the most modern, he was not, even in music, a prig; he had a sense of humour, and he liked melody. It follows that he appreciated Gilbert and Sullivan, and was not infrequently to be seen at the theatre during visits of the D'Oyly Carte Company. He told me once that Sidgwick, who had never heard a Gilbert and Sullivan opera, found it difficult

to understand what pleasure could be found in them. Maitland tried to induce him to go and hear one, for a long time without success. Finally, however, he was induced to accompany the Maitlands to a performance of "Patience." He appears to have enjoyed it immensely, and at the end of the performance said: "I should not have thought any modern production could have been so like Aristophanes." As in music, so in literature; Maitland's tastes were catholic. He could read anything so long as it was good of its kind. For the great nineteenth-century novelists, Scott, Thackeray, Dickens, and Meredith, he had a great admiration. As might have been expected from one who was himself an artist in words, he preferred Thackeray to Dickens—that was a comparison which was always being made in those days—but I think he would have placed Meredith first in order of merit, partly, as I believe, because he is so much more difficult. He was acquainted with the best literature in French and German, and in his later years read a good deal of Spanish. I cannot call to mind what his preferences were in verse. He was, of course, always inclined to think of himself as deficient in ordinary literary culture; he was, in fact, much better equipped in such matters than most of the people he had to do with. In later years he read but little general literature, except when too ill to work. It was saddening to those who observed him in those years to see how anxious he was to get back to his work from whatever else he was doing. There was so much to be done, and he was always conscious that he could count on but few years in which to do it.

From the letters published in Mr. Fisher's sympathetic biography something can be seen of the charm of his correspondence. But an editor dealing with letters is always in a difficulty. The most interesting and revealing letters are those in which the writer discusses living present issues, and in such letters he will speak freely about living men. Though Maitland never wrote bitterly of anyone, a good many people might have been pardonably annoyed at seeing free comment on them, meant only for his correspondent, published to the world. In a letter written in Spanish to me in answer to one in which I had asked him if he had looked at a certain work, then new, he said: "I do not know whether I shall understand X's book. He is learned, very learned, but stodgy." It was impossible to insert the name, and so the world learnt that Maitland thought someone stodgy, an impersonal fact of no enthralling interest; there are no doubt many persons whom the cap might fit. For the purpose of rendering "stodgy" in Spanish he had

to invent the word "stogioso." In the same letter he mentioned a certain acquaintance of ours in Canary, but as what he had to say of him was that when last he had seen him he was furiously drunk his name also could hardly be revealed. Something of the same difficulty confronts me when I try to find extracts which can be published from some other letters. Of a certain dear friend of his and mine he wrote when he learnt of his engagement: "I am congratulating hypothetically. I fear that you and I are not to be congratulated. Life is rather a sad story in that respect, and Dios Todopoderoso made only one Squire." Later, when I wrote him that the marriage had taken place, he wrote: "If what you said of the Squire be true, he is a deep 'un—a secretive Squire. The wretch sent me a beery though pretty postcard from the Koenigliches Hofbrauhaus zu Muenchen, and alluded not to the domestic event. Talked of a journey on business to tackle a German lawyer. Honeymoon, I believe. Or Meadmoon, if mead be beer and honey." On the eve of publication of a book of mine I wrote to him that only now were the glaring defects of the thing becoming apparent to me. He answered: "I guess that you are one of those people who suffer from nausea during parturition. I have been at that business a long time, and my vanity keeps me pretty happy till the last moment." There was not much vanity in his composition. He was more vain of riding a bicycle without holding the handle than he was of his literary work. Another letter contains the following: "All news from Cambridge is not good, however. I am truly sorry for the loss of Austen Leigh. When he was Vice-Chancellor, and I was on the Council (how long ago that seems!), I learnt to admire him greatly. He was straightness personified. Of the unfinished battle of the books"—that was the question whether law books should be removed from the University Library to the Squire Library—"I have reports from Clark and Kenny. I gather that all is going well. But the older I grow the less I can predict the motions of the Senate. I feel that it might even abolish compulsory Greek one of these fine days. My stars! but they are fine days here. Sometimes I take advantage thereof, but on the whole I have kept my nose very close to the grindstone, and have even redeveloped a corn on my little finger of which I began to get rid when I took to idling some seven years ago. If I apologized to you for the deterioration of my admirable handwriting, would you, or would you not, accuse me of irony? Anyway, I must not attack the hand which feeds me with letters from Cambridge, so I will change the subject,

stating simply that I have read your letter. What I think I was going to say when I slipped into personalities was that Leslie Stephen takes, and will take, a devil of a lot of biographing. I am not at all hopeful of the result, but he was a fine fellow, and I wish that I could do for him what he did for some inferior persons—I include Fitzjames and Fawcett.” It is not merely for the libel on my handwriting that I quote this letter, but for its revelation of his judgments on men. Everyone who knew Austen Leigh agrees with that judgment. Not everyone would agree with the judgment which makes Sir James Stephen an inferior person to Leslie Stephen. I do not think he meant intellectually inferior; but he was influenced by the fact that Leslie Stephen was full of the milk of human kindness, while his brother, whom Maitland did not know intimately and judged by his writings, does not in them show a very sympathetic disposition. It is characteristic that he should doubt his fitness for the office of biographer. In truth, he was a master craftsman in letters, and whether it was legal history or philosophy—I think he was at his best where law and philosophy meet—or Norman-French grammar, or biography, he touched nothing that he did not adorn, for the biography is a perfectly charming book and a splendid picture of the man of whom it speaks.

That letter was from Madeira, whence he wrote, a little later, what became steadily more frequent, a record of illness, but he found food for gaiety in it. “No more to-day. I vanquished the flu as I thought, but his tail has come swishing round, and I have had a little more bed. A *sequela*, I suppose. See *Magna Carta*, 1215, ch. 50, ‘nos penitus amovebimus . . . cum tota sequela eorundem,’ which I translate ‘with all their litter.’”

Maitland and Verrall were contemporaries, and made each other's acquaintance, I believe, in Maitland's third year. They grew intimate, and I think it was a visit of Maitland to the family home of the Verralls which provided him with a whimsical explanation of a curious characteristic of Verrall's which those who knew him will remember, a habit of prefacing and concluding his observations by a continuous noise which can best be defined as a crow. The explanation was that all the younger Verralls were great talkers, better talkers than listeners, and that when any one of them had completed his observations on any point it was his practice to follow them at once with this crow in order to prevent any of the others from intervening until he was prepared with his next observation. If it is not true, it ought to be.

The winter during which I was with Maitland in Canary was the time of the closing scenes of the South African War. He hated that war and, in a letter to Leslie Stephen, written about a year before and published by Mr. Fisher, he speaks of his distrust of Chamberlain, and says that he thinks worse and worse of him as time goes on. That verdict needs a little commentary. Some years later, when the Protectionist campaign was in full swing, I had some talk with him about Chamberlain. He liked this campaign no more than the other, but he expressed the opinion that Chamberlain was perfectly honest, but very stupid. His argument seemed to be that the propaganda which had appeared with his sanction contained what appeared to Maitland to be comic-opera statistics, so ridiculous that no politician would have staked his reputation on them if he had known any better. Whether this judgment represented a change of view, I do not know: "distrust," in the letter mentioned, may have meant no more than distrust of his capacity, not involving any moral judgment on the man. I suppose Maitland's politics would have had to be labelled Liberal Unionist, but in fact he could never have been a whole-souled adherent of any party. He was on the whole anti-Tory, but he did not like change as such. It will be remembered that he much deprecated the supersession of the administrative functions of the Justices of the Peace by the creation of new-fangled county councils.

In the foregoing remarks I have said little of Maitland's work. I am not qualified to criticise it, and it seemed to me that something of my impressions of the man might be of more interest. I should like to end with a few remarks on what seemed to me his most striking characteristics. The first and most immediately obvious was personal charm. The graceful fragile figure, the mobile handsome features impressed one favourably at once, but there was a great deal more than that. There was what I fear must be called an old-fashioned courtliness about his greeting to strangers. There was a real interest, not a mere air of interest, in what was said by those with whom he was in conversation, a desire to understand fully the other man's point of view, however little he might be inclined to accept it. There was an encouraging, one may almost call it an endearing, demeanour in his intercourse with younger students. All these combined to create in his pupils something for which affection is hardly a strong enough term, devotion not an exaggerated one. These characteristics were not superficial: they were in fact only the outward signs of a very sympathetic disposition. They were not put on and off, as they are by many men: no one

was further from an offensive *faux bonhomie*. It was well said by Liebermann that "out of his very sufferings he won a deeper sympathy for men." A deeper sympathy, because a deeper knowledge, but sympathy was natural to him. Of his amazing kindness to me when my health broke down and I too had to go far afield, I cannot trust myself to speak. In the way in which he endured his sufferings there was evidence enough of his sympathy. We did not always see it at the time, but it has since been borne in on me that the cheerfulness, and even gaiety, with which he faced his pains were not the outcome merely of a sunny disposition but partly of an anxiety lest he should distress those with whom he was speaking. So we younger men, while we revered the Professor, loved the man. Cambridge was a very different place after Maitland was gone: to some of us, I think, it seemed for the time intolerable.

The next characteristic—I am almost afraid to mention it—is Genius. That is no doubt a much misused word. It is applied, as I think, to a number of persons who have no claim to it. I have met few men to whom I should have thought it applicable, but of those Maitland was unquestionably one. I do not know who it was who said genius was the capacity for taking infinite pains: it is a false definition, but even in this sense the claim of Maitland was clear enough. His work was finished *ad unguem*. I do not mean that his opinions were at all points final; far from it: many sound corrections of opinions expressed by him have already been made. What I mean is that every writing of his was made to express as clearly and as fully as was possible, after the most careful and impartial research, the doctrines he set out to expound. But genius is, of course, a great deal more than that. I do not propose to try to define it. But it shone in every movement of his expressive features: it is found on almost every page of his writings. Intuition, imagination, insight, all these are factors in it, and these Maitland had in a very high degree. "Vision" is another word for it. To Maitland mediaeval law was not something in a book, but the life-blood of a living people. That was the attraction of the Year Books to him. There and there only, as he held, was the real life of the law and of the people to be studied at first hand. For him that law was a living system, and in his pages he makes it live again for his readers, in a way which few other scholars have approached. We are rather apt to speak of imagination as a characteristic only of work in what are called the fine arts, but that is much too narrow. Every historical student needs imagination if he is to do more than provide the bricks for better men's constructions.

There is an honourable sense in which Mommsen's *Staatsrecht* may be called a wonderful work of imagination: it was no less than the recreation out of poor and scattered materials of a vanished civilization. It was the same thing that Maitland did for the Middle Ages in this country. His imagination was always at work. But the difficulty about genius is that if it is indefinable it is also incommunicable. The only source from which those who never met the man himself can gain an idea of it is his writings. Speaking only for myself—for I do not venture here to speak for my hearers, many of whom are more familiar with Maitland's work than I am—I should say that *Township and Borough*, in which he told to Oxford, in the Ford Lectures, the story of Cambridge Town, and the middle of the third volume of his *Collected Papers*, will be found excellent specimens. I do not choose these as the best examples—who am I that I should pretend to pass such a judgment?—but as being less technical than some of his other works and yet concerned with things he had made peculiarly his own: the first, the history of mediaeval institutions; the second, our insular dealings with the notion of personality. If I direct any one to these books who does not yet know them, I have conferred on him a real benefaction.

The last characteristic to mention is the most important. It is his honesty of purpose, his singlemindedness, his lofty outlook. I put it last because the other characteristics were to be seen on a first acquaintance with the man and his work, but this loftiness of character is a thing which can be clearly known only after a considerable acquaintance with a man. Anyone may on occasion do a worthy act: it does not follow that, like Maitland, he could not possibly do anything else. He was, as he said in the preface to his *Canon Law in the Church of England*, a dissenter from the Churches. But he was no dissenter from the lofty morality which it is one business of the Churches to teach. There was no room in his mind for unworthy thoughts. He was intolerant of chicanery and pretence, but he was a merciful judge of the weak, and his charity was always ready to cover a multitude of sins. Someone has said that it is much to be regretted that fine high-minded boys grow up into such things as men. In this, as in some other ways, Maitland was a boy to the last—Whom the Gods love *die* young.

His outlook is shown in the view he took of his own field of work. For him the law and its history were not a mere intellectual exercise. The law was the guardian of civilization: its practice was for him, as for Madox, a kind of priesthood. In the introduction to the first volume of his *Year Books* he quotes

two magnificent passages, one from Mr. Justice Holmes, and one from Albert Sorel, in each of which is finely expressed the significance of law in the history of civilization. "I do not think," he says in a letter to Sidgwick, "that a man could be a judge of quite the highest order without a strong feeling for political morality." During his years of practice at the Bar there were two Vice-Chancellors, Malins and Bacon, the former of whom had an unenviable reputation for having his decisions upset. But I remember Maitland's saying to me that he much preferred Malins to Bacon, on the ground that Malins was always endeavouring to do justice, though he sometimes strained the law to do it, while Bacon seemed, so he said, equally ready to strain the law, if only he could do some injustice by it. He had, so Maitland thought, a curious bias towards injustice. In the letter to Sidgwick just quoted he says "I think you have hit off the English idea of a good judge—he does justice when he sees an opportunity of doing it." No doubt that would not be the whole qualification of a good judge for Maitland, but it would be an essential. And what is true of judges is not less true of lawyers. His view of the law cannot be better put than it was by Whittaker, in a speech on the occasion of the foundation of the Maitland Memorial Fund, in a passage which I will end by quoting: "Professor Maitland supplied the student with an ideal of law. He gave him an idea of the importance, of the magnificence, of the splendour of the study in which he was engaged, so that it was impossible at any time thereafter for one of his pupils to regard the law merely as a means of livelihood. The law remained something to be loved and studied for itself. . . ." And he added, "It was impossible for anyone to study under him and not to love him."

W. W. BUCKLAND.

THE CRIMINAL RESPONSIBILITY OF THE ALLEGED INSANE.

AT a joint meeting of the Cambridge University Medical Society and of the Cambridge University Law Society, held on October 28th, 1922, Mr. Travers Humphreys (Senior Counsel to the Treasury) and Dr. G. F. E. Prideaux (of the Ministry of Pensions, F.R.S.M.) debated the following motion: "That in the opinion of this House, the law of England, regarding the criminal responsibility of the alleged insane, is reasonable and fair: and in the interests of justice no alteration is called for." They have kindly permitted the *Cambridge Law Journal* to print their speeches in full.

Mr. Travers Humphreys: Mr. President, Members of the Cambridge University Law Society, Ladies and Gentlemen.—I am very much obliged to the President for giving me the opportunity and the excuse of visiting Cambridge—not for the first time—and particularly on an occasion when I have the privilege of joining in a debate upon such a very interesting subject as that which you are discussing this evening. The question of the responsibility for criminal acts which has to be attached to a given person who is accused of having committed a criminal offence is one which is necessarily of paramount importance to all persons who are engaged in the administration of justice. It always has been a matter naturally of great interest to all members of the medical profession from the scientific point of view, and a great many members of the medical profession are also engaged in the administration of justice in their capacity of witnesses. The subject is one which has also from time to time, somewhat spasmodically, aroused the interest of intelligent laymen and, as I venture to think, for this reason: that there is inherent in the composition of every Englishman a desire that justice should be done. In the case of a person who is accused of a criminal offence, justice means justice as between the community represented by the Crown, on the one hand, and justice to the individual who is accused on the other. In truth, we are all aiming at the same result—justice. We all agree—

I am quite sure that Dr. Prideaux and I would agree, and I think that everyone else here will agree—that what we want to arrive at is such a state of law as will ensure that on the one hand no person who is charged with a criminal offence and who is proved to have committed the act, shall be punished for that criminal offence if he did it because he was at the time insane. On the other hand we must be very careful that we do nothing to enable the criminal to escape the responsibilities and consequences of his crime. Now that sounds a very simple proposition, and so it is until you come to consider what it is you mean exactly by a person who is insane; and it is to the consideration of the subject of what we mean by a person who is insane that my observations in the course of proposing this motion to you will be addressed. The task of saying what we do mean by the word “insane” as applied to a person who has committed what in the normal person would be a criminal offence, is much more difficult than the task of saying what we do not mean by the word “insane.” I suppose we shall all agree that what we do not mean by the word “insane” is a person who is a lunatic by the definition of the law relating to lunacy—the Lunacy Act of 1890. Some of you have begun, probably, the study of Acts of Parliament—I am referring to the undergraduates: many among you are distinguished barristers, and they, I think, will agree with me, and those of the undergraduates who have just started will agree with me in a few years, when I say that the definitions in most Acts of Parliament are about as much use to a person who has some practical duty to perform as a sick headache; and you could not have a better illustration than the definition in the Lunacy Act of a lunatic. A lunatic is defined as a person of unsound mind. I will go just a little further. When a person is alleged to be of unsound mind, and there is a commission appointed to find out whether he is or not (it may consist of a jury or it may not), the tribunal which has to decide that question is told to consider the question whether the individual is of unsound mind and unable to look after himself and his affairs. It is quite obvious that there are a great many people who are not capable of controlling themselves or their affairs who yet are not so insane as to be non-responsible to the criminal law. So one gets no assistance from any definition which I know of in the Acts of Parliament, for one has still got to find out what is meant by a person of unsound mind. There are some people who think that everybody is insane—and they may be right for all I know. Some few years ago I had to cross-examine a distinguished medical man, who was described

by the papers—a phrase I have never liked myself—as an alienist; I should prefer to describe him as a brain specialist. Owing to his evidence, I said to him when we met, as we did, at lunch: “Tell me, doctor, as I understand it, your view is that we are all a little insane.” He said: “Of course we are.” I said: “Well, then, do I understand that you would shut up in lunatic asylums the whole of the population of this country?”—because it occurred to me that a difficulty might arise in getting warders to look after them. He said: “No, I do not go as far as that; but I do say that every person who commits a criminal offence is, in my opinion, a lunatic.” He may be right, but at least in discussing the question of those who, in a modern state of civilization, are to be acquitted on the ground of insanity, we must go somewhat farther than that distinguished gentleman.

Now, what is the meaning of insanity? Well, the way we arrive at it at the present time in the case of any individual—and of course we are discussing here practical politics, not a theoretical question but a practical question—the way it is done at present is this. The question of the sanity or insanity of any person who is accused of a crime is a question of fact, to be decided by a jury, and to be decided by a jury, according to the oath that they take, upon the evidence; and the first thing the jury have to consider is the evidence of the facts of the case. There are many cases in which persons are accused of a crime in which no medical evidence is necessary. It is not only a medical question—to some extent it is a question of common sense, as other questions of fact are. May I mention a case that happened within the last forty-eight hours—the case was tried within the last forty-eight hours—the day before yesterday. A woman—a very respectable married woman, the respectable wife of a respectable husband—devoted to her husband, had two children—a little boy of seven and a little girl of four. One morning her husband got up and went to work; she said good-bye to him; and a quarter of an hour afterwards she took her husband’s razor and cut the throat of her little girl—then threw up the window and called to a neighbour and said: “I have killed my little girl. I want some sleep.” In that case—I only mention it as an illustration—it did not want a medical man to tell the jury that the woman was insane. Nobody could have any doubt about it. Sane people do not murder their children, to whom they are devoted, without any rhyme or reason. And in such a case you have no difficulty at all; but in cases of difficulty juries are assisted very much by the evidence of scientific wit-

nesses, and I hope that no word that I utter to-night will be thought to convey any idea of disparagement of those distinguished scientists who devote their lives to the assistance of suffering humanity in the persons of those who are suffering from perhaps the most dread of all diseases—that is, disease of the mind. Those witnesses—sometimes general practitioners, sometimes experts in diseases of the mind, as of the brain—give the greatest assistance to the jury. But remember, they are not the judges of whether a man is insane or not; they can only assist the jury by telling them what is their expert opinion as to the probable state of mind of the person accused at the time he did the act he is accused of. Their evidence is listened to, but still the jury have to find the facts. In order that they may do this—in this as in every other criminal and civil case—the judge is there to assist them. The duty of the judge is to direct the jury upon the law. In the case which we are discussing now, therefore, every judge—probably many judges at the same time in different parts of the country—has to tell the juries what is the law—the abstract law, if I may use that expression—and assist the jury in applying that law to the concrete facts of the case they are trying. I think everybody will agree that in order that the judges should do that uniformly you must have some simple rule expressed in as simple language as possible, as shortly as possible, and as easily understood as possible, and as free from complications as possible. And that is the meaning of there being a rule of law, which there is in this country, and has been ever since 1843—a rule of law which is binding upon judges in stating to juries in such cases what is the law of the country. The charge of the judge to the jury, of course, does not stop there. A jury is not discussing a scientific problem, it is not discussing a theoretical matter; it is deciding the question of the guilt or innocence of a fellow-being—because a verdict of insanity is a verdict of not guilty. They have got to apply the law to the particular facts of the case, which vary every time.

Now the law which exists, and, as I have said, has existed since 1843, in this country is one which was originally promulgated under these circumstances: a Mr. Drummond, who was the private secretary of Sir Robert Peel, was murdered by a man named Daniel Macnaughton, and Daniel Macnaughton was tried for that murder. In truth, the person who was intended to be murdered was Sir Robert Peel himself, and Daniel Macnaughton mistook his secretary for Sir Robert Peel, and he was acquitted on the grounds of insanity; and the case

aroused great public interest, and as a result of it there was a debate in the House of Lords. The House of Lords was so much puzzled by the matter that they decided to ask the assistance of all the judges, and the judges in answer to that request by the House of Lords expressed their opinion as to what ought to be the rule stated by judges in future in directing juries as to what constitutes insanity in English law so as to excuse a person from the responsibility of the criminal act which he has committed. If those who are students of law—and that includes all lawyers, because I hope no lawyer ever ceases to be a student of law—if they care to know more about this matter than anyone will have time to tell them to-night, I venture to recommend to them the very admirable works, two in number, of Professor Kenny of this University: his *Cases in Criminal Law* and his *Outlines of Criminal Law*. But for the purpose of this evening, perhaps I may read to you the latest exposition of that law in a few words by the Lord Chief Justice of England only last May. You may take it, I think, that this is the law as laid down by the judges in 1843, expressed by the judges in their opinions in the House of Lords as being the proper direction to a jury by a judge under those circumstances. This is what the Lord Chief Justice said: "The rule that is founded upon the answers given by the learned judges in *Macnaughton's* case is as follows: the jury ought to be told in all cases that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity it must be clearly proved that at the time of the committing of the act the party accused was labouring under such a defect of reason, a delusion, or disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know that he was doing what was wrong." I don't want to prejudice the minds of any of those who are eventually going to vote upon this matter by reading the views of even the most eminent of lawyers, but merely for your information I will add that the learned Chief Justice continued: "This is a sufficient and salutary rule." That was his opinion. That, you see, assumes this—that in order to establish a defence of insanity a person first of all must be suffering from disease of the mind; secondly that that disease of the mind must have produced one of two states of mind in that person. First of all comes the very simple case of the man who, owing to disease of the mind, did not know the nature and quality of the act he was doing. That is the case of

the man who in killing his fellow-creature is so mad that he thinks he is cutting down a tree; the man who is so mad that when he strikes somebody on the head he thinks he is striking a dog. He is so hopelessly insane that it does not require discussion—he does not know the nature or the quality of it. A man must be very insane indeed if, knowing he is killing a fellow-being, he does not know the razor is a razor—he thinks it is just a pencil which he is drawing across the man's throat. And secondly, suppose he does know the quality of the act he is doing, then that he does not know that he is doing what is wrong; and medical men tell us—and of course judges in 1843 had medical men to assist them—medical men tell us that there are persons who are so insane that although they know they are committing a criminal offence, they honestly believe it is the right thing to do. There are people who have committed crimes of all sorts in that way. The most ordinary case is that of homicide, where people from some form of religious mania, under the belief—honest so far as they know—that it is their duty, kill somebody. And if by reason of disease of the mind the unfortunate person really believes it is the right thing he is doing, then he is excused from the consequences of his crime because he is found to be legally insane. That has been the law ever since 1843. The question of whether that law is sufficient and salutary has been discussed ever since 1843. It has been discussed by lawyers at their meetings and in their associations; it has been discussed by doctors at their meetings and in their associations; it has been discussed in conferences between doctors and lawyers with laymen added: in such societies as the Medico-Legal Society and in committees which have been formed from the various medical and legal societies where the other profession has been invited. Certainly, I may say, many such joint discussions, such conferences, have taken place since 1874; and, Mr. President, so far as I am aware, not one of those meetings of lawyers or doctors or joint conferences has ever been able to formulate a set of words which they would accept as an amendment to the law as laid down in 1843. And why? I venture to submit to this House that the reason is to be found in the language of the motion which I have the honour to propose, the meaning of which is this, if I may elaborate for a moment (the language of it you heard from the President): I am not here to say that the law on this subject is perfect—I should be very sorry to say that of any human law; I am not here to say that the time may not come when the law may be found to be capable of alteration in a given particular—I

should be sorry to say that of any law that I know; but I am here to ask you to say that so far as the present state of knowledge goes—unless Dr. Prideaux has discovered what his confrères and mine have never been able to discover so far as I know (or at any rate it is not published), some formula which would be acceptable to the people interested at large, and which would form an acceptable amendment of the law—I am here to ask you to say that the best thing is to leave the law as it is, since I know of no lawyer and of no doctor who has ever ventured to suggest that it does not do justice as it is administered at the present day in this country. Now the first person, so far as I know, to propose or try to propose an amendment of the laws laid down in the Macnaughton case was the late Mr. Justice Stephen, a very great lawyer. Mr. Justice Stephen wrote a digest of the English criminal law, and in it he did his best to improve upon the rule in Macnaughton's case, and he put^d—with various brackets and with various limitations—something which he suggested might be an improvement. And it does not go further than that. Let me read to you now what it was that Mr. Justice Stephen proposed, just adding by way of preface that Mr. Justice Stephen was careful to say in that digest that he was satisfied that the law as then administered was capable of being so construed by judges that it would do justice in every case: but theoretically he thought that it might be improved, and in this way. He proposed that the law should be stated in this way: "No act is a crime if the person who does it is at the time when it is done prevented either by defective mental power [I take it, an idiot] or by any disease affecting his mind, from knowing the nature and quality of his act, from knowing that the act is wrong." But then he added a third: "from controlling his own conduct, unless the absence of the power of control has been produced by his own default." Now, with the greatest respect to the memory of that learned judge, I venture to suggest to this House (and what I am saying now has been said before) that that is a perfectly impossible addition to make. You will notice that the learned judge sees that it is necessary to safeguard the finding of a person not guilty, merely because he has lost control of himself, by adding the words: "unless the absence of the power of control has been produced by his own default." In this University town, with the logical minds which I know are possessed by members of the University, is it not apparent to everyone how utterly illogical that is? You are trying a fellow for crime; you are satisfied that he is insane because your definition of insanity is that he is insane if he has

got no effective control of himself—in other words, what he did, he could not help doing; but you say, “You shall not escape the consequences of your crime, you shall still be punished if it is your own fault that you lost control of yourself.” You are not punishing the unfortunate man for the crime he has committed, but you are punishing him for becoming insane. That is what you are going to hang him for, if it is murder he has committed. Surely anything more illogical could not be imagined. Just conceive the difficulty that the jury would be in if they had to try such questions. Let me put this case—not an uncommon one. Some man has committed an act of violence in a state of drink. He is intoxicated, his history shows that he has frequently become intoxicated, he is a thoroughly intemperate person. I suppose that such a case, according to Mr. Justice Stephen’s definition, would be a very good example of a case where, although the man is prevented from controlling his own conduct by disease of the mind, yet the absence of the power of control has been produced by his own default by his repeated giving way to intemperance. But supposing that wretched creature has become a habitual drunkard because he has been brought up from babyhood in a home where drunkenness was in the ordinary day’s work, where every evening he has seen his father and mother come home and quarrel when they are drunk, and by the time he is seventeen or eighteen and goes out to work he himself has become a hopeless drunkard—is anybody going to say that that man ought to be punished because he has rendered himself insane through drink? A great difficulty would be experienced in asking a jury to come to such a conclusion as that, but if they did not they would be violating their oaths because they had not returned a verdict of guilty; unless they were satisfied that he had not by his own conduct brought about his own absence of control. Is it not a little unnecessary to add those words to the definition of the judges? It may be that not very many of you have had experience of the ways in which juries do attack these cases—never having been on a jury myself I naturally have none—but I think we may assume that a jury, which after all consists of twelve people (nowadays, I am glad to think, men and women) who do not know each other and whom you may be quite sure are neither scientific persons, mental experts, nor lawyers; I think you may rest assured that what they will do is to look at the case broadly. And if they are satisfied that the man who has committed the crime that is charged against him really is insane, really did not do it from some wicked motive—such as jealousy or want

of money—but did it because the poor fellow was insane; do you think they are likely to bother about the question of whether the real state of that man's mind when he committed the crime (it is sure to be a month or six weeks ago from the time when they are trying him) was that he did not exactly know that what he was doing was wrong, or he knew it was wrong but could not prevent himself from doing what was wrong? Don't you think that you may trust juries in this country to do justice in such a case, and not to go into such extreme niceties as the difference between the loss of power of control owing to mental disease, and the failure to know whether a man is doing right or wrong?

Well, now, there is just one aspect from which perhaps Mr. Justice Stephen's third addition might be a little dangerous. We are all apt to lose control of ourselves if we do not take care—all who have been educated at Cambridge have been educated in the necessity of keeping control of themselves, because that is what universities and schools are for (you can always tell a Cambridge man anywhere!). But you know there are people who are not quite so fortunate, and it is not an uncommon thing to find people of an ungovernable temper—I think it is more correct to call it an ungoverned temper. People say: "Oh, he did it in a moment of frenzy, poor fellow." Are you going to acquit that man on the ground that he is insane? If you give to a jury—who always want to find people insane (and perfectly naturally) if they can within the law—the power of saying that because a man has lost control of himself he is to be acquitted, you are putting a very dangerous weapon into the hands of people who would be very glad to use it. And I don't blame them; no one wants to convict a man of a serious crime.

Those are the criticisms that I venture to apply to the suggestion of Mr. Justice Stephen, which, so far as I know, is the only suggestion that has ever been put into words as a real proposal for an amendment of the law. That suggestion of Mr. Justice Stephen was embodied in a Bill which was presented to the House of Commons in 1874 (the Digest was a few years earlier), and, after hearing witnesses, the House of Commons threw it out and refused to have any amendment of the law—and that is why there has been none.

So much for lawyers. Let me turn for a moment to the doctors and see how they have been able to help us in this matter. I have here the *Journal of Mental Science* for 1896, and the *Journal of Mental Science* is the authorized journal of the Medico-Psychological Association of Great Britain and

Ireland; and I see from the names inside it that articles were contributed to this *Journal of Mental Science* by practically all the best-known authorities upon this very difficult subject; and it seems that in 1896 the Medico-Psychological Association appointed a special committee to consider this question of the responsibility of the insane, and the committee had the advantage of some memoranda specially prepared for them. The committee consisted of most distinguished persons, and they were asked to consider the question, upon which they reported to the association. I have here the report of those distinguished medical men, and I think that instead of troubling you by reading to you all the report—it is a long one—it would be sufficient perhaps if I just read the final words of it; and this is what the committee said: “Under the state of circumstances disclosed by their investigations, your committee are unable to make any recommendations for the amendment of the law.” That was in 1896 and was the best the doctors could do, up to that time, in suggesting amendments of the law. That was a committee; and some of the other members of the association, being scientific persons with scientific minds, said: “That recommendation is not quite satisfactory, because while we agree that we cannot improve the law and it cannot be usefully amended, it does not follow that we agree with the law.” And accordingly there was a great discussion upon that recommendation, and after everybody had had his say at considerable length, the association as a whole came to this conclusion (and it was unanimously agreed): That the report of the committee as amended be received and adopted, the concluding paragraph of the report to be amended as follows: “Under the state of circumstances disclosed by their investigations, your committee, while not approving the doctrines and definitions contained in the Judges’ answers to the House of Lords in 1843, are at present unable to make any recommendations for the amendment of the law.” That was the best that they could do. Now, searching around, I have found that the British Medical Association in 1915 considered this matter, and they were good enough to invite to assist them in their deliberations a number of other people, including some lawyers. They had a committee, and they decided that the following might be accepted by the medical profession as a fair definition of responsibility for crime, in preference to the ruling laid down by Sir James Fitz-James Stephen—they added to the two paragraphs which at present constitute the Rule in Macnaughton’s case: That a person should be excused from controlling his own conduct

unless the absence of the power of control has been produced by his own default.

This opinion adopts with variations the above quoted Article 27 of Sir James Fitzjames Stephen's "*Digest of Criminal Law*" and, by its form, allows for further expansion of the principle if suggested by the progress of human knowledge.

Mr. President, in closing my observations, may I say this: It seems to me that in those last words the British Medical Association Committee give away their whole case, for in truth the great advantage of the present rule in *Macnaughton's* case is its very vagueness, because it allows judges to direct juries according to the facts of the case; it leaves them a free hand more or less, and that is the same advantage which we have in this country by having a common law which is elastic and not rigid. The doctors, you see, said: "We do not approve of the law, but at the same time we cannot recommend any alteration in the law, except something which might be adopted perhaps by the medical profession." May I suggest that the answer to that proposal is the answer made by the immortal Old Bill when he was told by his comrade that he did not approve of a particular hole in which they were ensconced: "If you know of a better 'ole, go to it." I suggest that as soon as the medical profession or the critics of the law know of a better law, let us all go to it; until then, let us leave it as it is, since it is universally acknowledged that it works no injustice. I have much pleasure, Mr. President, in proposing the motion which you have put to the House.

Dr. Prideaux: Mr. President, Members of the Cambridge University Law Society, Ladies and Gentlemen.—I have to thank you for the honour you have done me—though it is somewhat of an ordeal—in inviting me here to-night to oppose this motion that Mr. Travers Humphreys has put before you. I had some misgiving in accepting your invitation, for, as I warned your President, I could neither speak in public nor could I use such eloquence as you have already heard to-night. I was not told what the motion was that I was being asked to oppose: I was told that Mr. Travers Humphreys was proposing a motion relating to insanity and responsibility, and I was asked whether I would oppose it. I was, I suppose, expected to adopt the attitude of the Irishman who, on landing in New York, asked if there were a Government there, and when given the answer in the affirmative, replied: "Then I'm agin it." I wish to make it quite clear at the outset that I do not uphold the theory

that if a man commits a crime he is therefore insane. But I do wish to make it clear that, although the legal relations of the insane were determined long before insanity was recognized as a disease, we now recognize that crime may be, and often is, one of the symptoms of insanity, but not the only one. What I want to stress is the point that insanity is a disease which, like most diseases, has several symptoms and signs, of which the conduct is one, and an important one, but only one. Law does certainly recognize that crime may be a symptom of insanity, but where we differ is that law cannot appreciate, it does not recognize, the true import of the remaining symptoms which stare medicine in the face. That is really our difficulty when we get discussions between the law and the medical profession on this question, for the law concerns itself with this one symptom only—the offence, the alleged crime.

Now I shall not have to trouble you with the law. Mr. Travers Humphreys has told us—with certain reservations, which I shall come to later—what the law is, and how it is supposed to be interpreted. First of all, I think it would be quite fair to ask: What do the judges themselves think of this law? I think also it would be fair to consider how it affects juries, and then I shall be able to tell you what medical men think of it. As to what some of the judges have thought of this law, let me give you the opinion of one of the greatest judges we have ever had on the Bench (Coleridge, L.C.J.): “One practical evil of the existing state of things is its extreme uncertainty. Judges swing to and fro like pendulums in their charges to juries, and if a man is tried, after some scandalous acquittal, he gets no fair justice. There is something very shocking in putting a man to death whose responsibility as a moral agent is at all doubtful.” He also remarked: “Judicial decisions on questions of insanity were bound by an old authority, which by the light of modern science was altogether unsound and wrong. The law of England on that subject was contradicted by modern science” (*R. v. Pearsall*).

Another famous judge (Hawkins, J.) stated in *R. v. Ware*: “The law with respect to the responsibility of criminal lunatics appeared to him to be in a very unsatisfactory state, and he must confess that the rules seemed hardly to meet such a case as he had just mentioned”; and further, that it was “not his view only—but that of judges generally—that the whole subject should be reconsidered.”

Now let us see what McCardie, J., said recently in the *R. v. True* case: “I myself feel that the rules that were stated

in 1843 are not clear and are not exhaustive"; and he was of the opinion that "the House of Lords should determine the tests at the present day."

Then Sir F. J. Stephen, to whom Mr. Travers Humphreys has already referred, in his comments on the Macnaughton rules, admits that, "when they are carefully considered, they leave untouched the most difficult questions connected with the subject and lay down propositions liable to be misunderstood"; and also: "Every judgment since 1843 has been founded upon an authority which deserves to be described as in many ways doubtful."

Those are the opinions of some of the most experienced judges in this country. I cannot help giving you another opinion, an opinion of an American judge. In America they used to follow the same ruling, the Macnaughton ruling. This is what Ladd, J., said in the case of *State v. Jones*: "It is probable that no ingenuous student of the law ever read it for the first time without being shocked by its exquisite inhumanity. It practically holds a man, confessed to be insane, accountable for the exercise of the same reason, judgment, and controlling mental power that is required in perfect mental health. It is, in effect, saying to the jury: The prisoner was mad when he committed the act, but he did not use sufficient reason in his madness. The absurdity as well as the inhumanity of the rule seems to me sufficiently apparent without further comment."

Let us see how this law is put into practice. How do juries interpret it? What are the directions and interpretations of the law given by various judges? I would like to give you, first, the direction which was given in *R. v. Oxford*, a trial which took place in 1840, just before the Macnaughton ruling was brought in, the direction given by Denman, L.C.J.—I give it to you because it shows the state of the law at that time, and it also shows that before the Macnaughton ruling a man's absence of the power of control by reason of insanity was admitted as an excuse for crime: "If a man were the agent of a controlling disease which he could not at all resist, he was not then held to be a guilty party, and he would be entitled to an acquittal on that ground." This also was the first occasion on which the term "insane" was used in giving directions to a jury, the question being "whether the prisoner was insane at the time when the act was done."

Since the Macnaughton ruling some judges have interpreted the law in one way and some in another, and some have ignored the ruling altogether. I cannot do better by way of illustrating this point than by giving you some of the directions that have

been given. Some judges interpret the ruling in its strictest sense. For instance, as showing how the law can be strictly interpreted, I would refer to the case of *R. v. Jefferson* (1908). Bigham, J., in directing the jury: "If the prisoner knew he was doing wrong, it does not matter that he knew how wrong. If he knew he was doing wrong, it does not matter that he was suffering from delusions or hallucinations. A man commonly described as a lunatic may be as guilty of murder as any of you. You have got to determine whether he knew he was doing wrong. It is for the prisoner to satisfy you beyond all reasonable doubt." If he knew he was doing wrong, it does not matter how insane he was; he is guilty. That is the direction of Bigham, J.

Now, as opposed to that, you have a case which is well known, a case which I will not read, of *R. v. Brocklehurst*, in which the whole question was waived. Counsel proceeded to address the jury, and to argue that the Macnaughton ruling should be laid down, when the judge interposed with the remark that the doctor had said distinctly that the prisoner was of unsound mind. Counsel for the prosecution suggested, however, that the question for the jury was whether the prisoner was capable of appreciating the difference between right and wrong. But to this his Lordship replied: "No, the question is whether he was insane at the time"; and he then asked the jury: "Do you feel any difficulty about it, gentlemen?" The foreman replied, "Not the slightest"; and the jury found, "Guilty, but insane." In certain cases the loss of the power of control has been definitely admitted. In *R. v. Joseph Gill* (1883) the direction was: "The most important question was, Were they dealing with a sane man? Judges had said over and over again that a sane man could not be considered insane merely because he did a criminal act, and the importance of that view could not be over-estimated. Nevertheless he did not agree with the learned counsel, who put it that it was necessary to prove that a man did not know the difference between right and wrong to show that he was insane. If a man's mind was in such a diseased condition that he was subject to uncontrollable impulse, they would be justified in finding him irresponsible for his actions." In that case you get a very definite admission of uncontrollable impulse as being an excuse for crime, and the direction in *R. v. True* is of a similar nature. In some cases the interpretation is even wider, as in the case of *R. v. Greatrex* (1892), when Wright, J., told the jury: "The responsibility

of an accused person may depend upon the answer which must be given to the question, ' Could he help it? ' "

Of recent years the jury is more often directed that uncontrollable impulse is no excuse, as, for example, in *Bray, J.'s* direction in the case of *R. v. Coelho* (1914): " An insane impulse, even when uncontrollable, affords no defence." We get exactly the same direction in *R. v. Quarmby* (1921): " The only test was whether the prisoner was in such a defective state of mind that he could not appreciate the nature and quality of his act, but that irresistible impulse had never yet been accepted as an excuse for crime. The evidence of uncontrollable impulse was based on speculative theories which had not yet been generally accepted."

Those directions show you how the interpretations of the judges vary; how, as Coleridge, L.C.J., put it, " they swing to and fro like pendulums." Now there is just one more direction which I am going to lay before you, as it shows the path along which some alteration in the law would seem to be possible. It is a direction given in America in the case of *State v. Pike*. The Court charged the jury that, " if the defendant killed his wife in a manner that would be criminal and unlawful if the defendant were sane, the verdict would be ' Not guilty by reason of insanity ' if the killing was the product or offspring of mental disease in the defendant. Neither delusion or knowledge of right and wrong, nor design or cunning in planning and executing the killing and escaping or avoiding detection, nor ability to recognize acquaintances or transact business, is as a matter of law a test of mental disease; but all symptoms and all tests of mental disease are purely matters of fact to be determined by the jury. Insanity is mental disease. An act produced by mental disease is not crime. Whether every insane impulse is always irresistible is a question of fact. The only element of law which enters into the question is that no man shall be held responsible criminally for an act which was the offspring and product of mental disease. This doctrine rests upon principles of reason, humanity and justice, too firm and too deeply rooted to be shaken by any narrower rule that might be adopted on the subject. If sanity is an indispensable ingredient of all crime, insanity should clearly exempt from the responsibility attaching to a criminal act. It is for the jury to say whether the act was or was not the product of mental disease." That is the direction which I shall put before you when I come to put forward the alteration which I am going to suggest.

Now let us turn to the criticism of the actual law—Mr. Travers Humphreys gave you the law, the Macnaughton ruling—as it stands to-day, and as it is given; not necessarily as it is interpreted, but as it is given and laid down for the use of juries. There were additions. He did not give you the whole of the Macnaughton ruling; and I think perhaps it is that part of the Macnaughton ruling, as much as the other part already given to you, to which the medical profession takes exception. The part of the ruling which you have heard was really an answer to two questions—the second and the third. There were two other important questions—the first and the fourth. The fifth and last need not concern us, as it only dealt with a matter of procedure. The first question was with respect to the law affecting persons afflicted with insane delusions in respect of one or more particular subjects or persons. The answer to that question was that, “assuming that enquiries are confined to those persons who labour under such partial delusions only, and are not in other respects insane, if he did the act with the view of redressing or revenging or producing some public benefit, he is punishable if he knew he was acting contrary to law, by which is meant the law of the land.” That was the answer to the first question. To the second and third questions you have had the answers from Mr. Travers Humphreys. The fourth question was: “If a person, under an insane delusion as to existing facts, commits an offence in consequence thereof, is he thereby excused?” The answer was: “Again, assuming as before that enquiries are confined to those persons who labour under such partial delusions only, and are not in other respects insane, he must be considered in the same situation as if the facts with respect to which the delusion exists were real.” Now the objection to these two questions—the first and the fourth questions and their answers—is, first, that it is difficult to understand how a man can have delusions with regard to persons and subjects without having delusions with regard to existing facts; and secondly, the answers are opposed to each other. Moreover, the answer to the first question—that if he had delusions with regard to persons or subjects he is punishable if he knew he was acting contrary to law—really conflicts with that relating to knowledge of right and wrong, as an insane person may do an act which he knows to be contrary to law, believing it by reason of his insanity to be right, as Mr. Travers Humphreys has pointed out. But the main objection to these answers is that they purport to deal with persons who labour under partial delusions only, and are

not in other respects insane. In point of fact they accept the doctrine of what is known as partial insanity. To-day medicine does not recognize that there is such a thing as this form of partial insanity which the law still cherishes. To suggest that an act which is the outcome of a delusion is at the same time produced by a spirit of revenge, springing from some part of the mind which is not pathologically affected, is a conception which we cannot uphold, and which we believe to be wrong. The late Dr. Mercier was very emphatic on this point; and he claimed that there was not, and there never had been, a person who suffered from partial delusions only and was not in other respects insane. In the olden days delusion and insanity were synonymous terms. We recognize now that a delusion is a symptom of a deep-seated disorder—a delusion is a symptom of insanity. It is more correct to say that a person has a delusion because he is insane than to say that a man is insane because he has a delusion. This doctrine of partial insanity we want to get rid of. It is not only the doctors who dislike it. I will give you some opinions from legal authorities, because I think there may be a feeling amongst you that what doctors say is a little biased. Lord Brougham, for instance, had a very great objection to this doctrine. "It is as absurd," he said in *Waring v. Waring*, "to speak of this as a really sound mind as it would be to say that a person had not the gout because, his attention being diverted from the pain by some more powerful sensation, he for the moment was unconscious of his visitation." And Sir F. J. Stephen stated: "It is practically impossible to say what part of the conduct of a person, afflicted with a fixed insane delusion, is unaffected by it." That means, gentlemen, that there is nobody who suffers from a delusion who is not in other respects insane. Therefore those questions, the first and fourth, in reality should not be applied to anybody.

Now let us go a little more closely into the answers to the second and third questions, which lay down that only a person who did not know the nature and quality of the act at the time he was doing it, or who did not know that he was doing what was wrong, could be excused from the responsibility for a criminal act on the grounds of insanity. The objection to this answer is that it again makes use of a theory which is contrary to modern knowledge. Insanity is here regarded as being simply a particular deficiency of intellect. It is regarded as a defect of reason, says the law. Now the medical profession does not understand by insanity "defect of reason." A man

may be very insane, but he may reason very accurately and very soundly on certain subjects. This theory of insanity is a very old theory of more than 100 years ago. In the early years of last century it was upheld by the medical profession, and was accepted by the law, as is shown by Erskine's defence of Hadfield in 1800. "It is agreed," said Erskine, "by all juries, and it is established by the law of this and every other country, that it is the reason of man which makes him accountable for his actions, and that the deprivation of reason acquits him of crime." That is a theory which medical psychologists have given up for more than sixty or seventy years. That view, however, never seems to have altered, so far as the law is concerned; and the law does not even now recognize that, in the ordinary affairs of life, men are in reality more guided by feeling than by reason. Our conduct is determined primarily, and always to some extent, by feeling, and never by the intellect alone. It is not the reason, it is the moral character of a man, which determines his responsibility. It is the moral character, using this term in a strict psychological sense, which enables us to exert what is usually spoken of as "self-control," and to act in accordance with the moral code. The mere knowing of the difference between right and wrong is of little value in itself—a child may acquire this knowledge quite early in life without necessarily having a sufficient strength of moral character to prompt him to right conduct. It is the feeling which prompts one to action, in accordance with the moral code, that is essential.

As to the term "nature and quality" of the act, I take it as Mr. Travers Humphreys has laid it down. I must confess that I have always had much difficulty in really grasping the meaning of the term, and I was pleased to hear his explanation. But it may be asked whether there are such persons labouring under such a defect of reason from disease of the mind as not to know the nature and quality of the act in that sense, or as not to know that it is wrong. As to this, let me give you the opinions both from the side of the law and of medicine.

In his evidence before the Select Committee on the Homicide Law Amendment Bill in 1874 Lord Bramwell answered: "The present law lays down such a definition of madness that nobody is hardly ever really mad enough to be within it." And Sir William Markby, in his *Elements of Law*, says that, on the Macnaughton ruling, "all the essentials of legal liability will on examination be found to be present in nearly every case,

as instances are so rare in which a man does not know the nature and quality of his act or that he is doing wrong," &c.

Dr. Nicholson, who was Medical Superintendent of Broadmoor, wrote: "The *dictum* is not a satisfactory one, and if it were insisted upon to the bitter end it would have been the means of hanging more than half the women and many men now in Broadmoor as criminal lunatics." And Sir John Bucknill stated that "in all his experience he had only known one lunatic to whom the *dictum* could be properly applied." My own experience—and during the last year I have examined individually some 3,000 certified insane persons in mental hospitals throughout the country—is somewhat the same, and I very much doubt whether any of the insane persons I have examined who were capable of committing a crime could be included as insane under this law if it be interpreted in a strict and narrow sense.

This law, then, may be so construed that it does not include anybody who is insane; and yet medical men are called, and are asked, to give evidence relating to a conception of insanity which they hold does not in fact exist. The position of the medical men is something like this. They say: Supposing a law had been laid down 100 years ago to the effect that for a man to suffer from an infectious fever he must have a rash, and supposing that to-day a doctor had to give evidence to show that a man suffering from typhoid fever was suffering from an infectious disease, he might have to admit that the patient had no rash, and then the law would decide that the man was not suffering from an infectious disease. The absurdity of such a decision would be obvious to everyone. Yet that is very much the position to-day in regard to the Macnaughton ruling as seen from the medical point of view. Let me remind you that Mr. Travers Humphreys has agreed that no insane person should be punished if the act is the outcome of mental disease, or, as he put it, if he committed the offence because at the time he was insane; and yet, gentlemen, you have a law which can be so interpreted that it will scarcely include anybody who is insane. You are left in the position that, according to law, as you have seen by the directions of judges, a man is not insane unless he does not know what he is doing; and according to medicine a man, though he knows what he is doing, and knows that it is wrong, may be very insane and not be responsible for his acts. Responsibility is not a question of a man knowing what he is doing; it is a question of the moral character of the man, of the power of discrimination,

the power of judging and discriminating, the power of choice, not simply (as we say in psychology) a matter of cognition, not merely a question of knowing whether the act was right or wrong.

Seeing that the position, as far as I shall have time to develop it, shows that few, if any, insane persons are included in the law, I suggest that some alteration of the law is necessary. It is a very simple alteration that I suggest, because, as a matter of fact, Mr. Travers Humphreys and myself entirely agree—at least, if I understand the way he put it. “The question of the sanity or insanity of any person,” he said, “is a question of fact to be decided by a jury”; and I think this is almost the same as the law which I want brought into force. Now doctors will never define insanity; they do not pretend to be able to do so. Who can define sanity? We are not peculiar in that respect. The law does not, I believe, define fraud, and for a very special reason. The law says: “No, we are not going to define fraud, because it might be possible for ingenious persons to devise some means of evading a stereotyped definition.” Fraud is a question of fact to be decided by a jury. It would not be possible to give any definition of insanity that would accurately meet every case, and greater difficulties still arise when we try to define “responsibility.”

All that we require in the way of an alteration is that this archaic ruling should be done away with, and that the common principles of the law should be allowed to take their course. That is all we ask—that insanity should be decided as a fact, not pre-judged by a direction given by a judge. It is neither correct according to modern science, nor is it just, for the Judge to say to the jury: “Insanity is so and so.” “You must bring him in insane if he does not know the nature and the quality of the act; if he does know it, then he is perfectly sane and responsible.” The direction given in the case of *State v. Pike* is fair and reasonable, and is the one that I would like to see followed.

The question put to the jury should simply be as to whether mental disease or deficiency was the cause of the act or omission, and it should be left to the jury to decide as a question of fact after hearing the evidence of experts, as is done in cases of testamentary capacity.

My time is up, gentlemen. I hope I have been able to show you some of the weaknesses of the present law. It has been repudiated by experienced judges, condemned by mental experts all the world over, misunderstood by juries, interpreted

differently by various judges, so that conviction has been sometimes merely a matter of chance, and further it is based on faulty psychology and excludes almost all insane persons. I will therefore ask you to say that the law in England with regard to the criminal responsibility of the alleged insane is unfair, is unreasonable, and in the interests of justice some urgent alteration is called for.

Mr. Travers Humphreys' reply, after the motion had been debated by the House: I will reply in a very few words indeed, because time is getting short. May I suggest that the difficulty which those who are opposing this motion find themselves in is precisely the difficulty that always has been felt—they cannot suggest a better method. The nearest approach to it that I have ever heard has been suggested to-night, both by Dr. Prideaux and Mr. Hollond—abolish altogether all definitions of insanity and tell the jury: "You have got to find whether this man was insane. I do not know what insanity means, nor do you, but you have got to decide whether this man is insane. That is to say, you have got to decide whether to punish him or not." That is a hard thing for the jury to decide. But it is not a purely medical question as to whether a man who has committed a crime, who has done something which in an ordinary person is a crime, is to be punished or not. In the case of the man which Mr. Hollond put: Has he got influenza or not? Now that is a man who can be examined by a doctor; and he can say, and no one else, whether he has influenza. In the case of alleged insanity you have got to have the doctor's view, but the jury have got to decide the case on a great number of other things as well; they have to decide whether there was a motive or not. I only want to point out this: It seems to me it is not merely a question of deciding whether the doctors are the best people to say whether a man is or is not suffering from delusions of the mind; the jury have got to decide upon the culpability or otherwise of their fellow-creature, and surely it is too much for the jury for the judge to say: "You must decide yourselves without assistance from me."

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THE CAMBRIDGE AND HARVARD LAW SCHOOLS.

ONE of the most interesting features in the life of the Law School of Cambridge University since the War has been the cordiality of the relations between it and the Harvard Law School. Contact between the two is, however, no new thing, for Professor Maitland and Professor Ames were friends and assiduous correspondents, and *Finch's Cases on Contract*, first published in 1886, was edited under the influence of the system of teaching introduced by Langdell.

In the Lent term of 1921 Professor Beale, of the Harvard Law School, lectured at the Law Schools on "Principles of Legal Liability." In May of that year he was given an Honorary LL.D. degree, the Public Orator in his address pointing out that Professor Beale was one of those who in modern times have been most successful in strengthening the foundations of the great Law School at our sister University.

In the Lent term of 1922 Professor Pound, Dean of the Har-

vard Law School, delivered a series of lectures in Trinity College. The Cambridge University Press has now published these lectures in book form under the title: *Interpretations of Legal History*. In June he received an Honorary LL.D. degree. Both Professor Beale and Professor Pound have been made members of Cambridge Colleges: the former of Emmanuel, the latter of Trinity.

In March of this year President Lowell, of Harvard, gave a lecture to History and Law students.

In February of this year Dr. Winfield, Fellow of St. John's College, went to the Harvard Law School to deliver a series of lectures on English Legal History. These lectures are in place of one of the regular courses given by Professor Wambaugh, who has leave of absence. It is hoped that Professor Wambaugh will visit Cambridge University in the May term and deliver some lectures on the American Constitution.

In 1919 the Choate Fellowship was established in memory of former Ambassador Choate, by which a Cambridge graduate is annually sent to Harvard University. Three nominations have so far been given to law men, who have thereby been enabled to attend the Harvard Law School. They are S. N. Grant Bailey, of Caius; J. W. Morris, of Trinity Hall; and T. F. T. Plucknett, of Emmanuel. Among resident teachers the Downing Professor, Dr. Hazeltine, is a graduate, and the Reader in English Law, Mr. Hollond, was, during a year's leave of absence before the War, a member of the Harvard Law School.

Besides this personal contact there have been other interchanges between the Universities. In recent years the *Harvard Law Review* has published articles by various Cambridge men, among which might be mentioned particularly those of Professor Hazeltine. The *Cambridge Law Journal* has had the honour of publishing articles by Professor Beale and Professor Pound.

On November 1st, 1922, Professor W. W. Buckland, Regius Professor of Civil Law at this University, was awarded the Ames Prize, given by the Harvard Law School every four years for the most meritorious law book written in the English language and published not more than five years before the award. Professor Buckland's book was: *A Text Book of Roman Law*, published in 1921.

A. L. G.

NOTES ON RECENT CASES.

RATE OF EXCHANGE—JUDGMENT FOR AMOUNTS ASSESSED IN FOREIGN CURRENCY—DATE FOR CONVERSION INTO ENGLISH CURRENCY—DAMAGES FOR BREACH OF CONTRACT—DEBT—CLAIM IN WINDING-UP OF COMPANY.

In re British American Continental Bank, Lim.; Goldzieher and Penso's Claim. [1922] 2 Ch. 575. *The Same; Crédit Général Liegeois' Claim.* [1922] 2 Ch. 589.

THE decisions in these summonses in the winding-up of a bank have further elucidated the principles relating to the rate of exchange at which claims, estimated in foreign currency, should be converted into sterling.

The applicants in the first summons claimed damages for breaches, committed by the bank before the date of the winding-up order, of contracts to deliver foreign currency to the applicants' order. In the second summons the applicants were bankers with whom the bank had kept a current account in Belgian currency. This account, which was closed before the date of the winding-up order, showed an overdraft. The amount of damages, assessed in Belgian currency, to which the applicants in the first summons were entitled in respect of the breaches of contracts, and the amount, in Belgian currency, due to the applicants in the second summons, were agreed. It was also admitted in the second summons that the overdraft was due to the applicants on the date on which the account was closed. The question in dispute in both summonses was whether, for the purpose of fixing the amounts for which the respective applicants were to be admitted as creditors in the winding-up, the sums ought to be converted into English currency at the respective rates of exchange ruling at the dates of the breaches of the contracts and on which the debt became due, or at the rate ruling at the date of the winding-up order, at which time the Belgian franc was of greater value.

The principles were already established that an English Court has no jurisdiction to order payment of money except in English currency (*Manners v. Pearson* [1898] 1 Ch. 581, at p. 587), and that in an action brought in an English Court for damages for breach of contract, where the damages have to be assessed in a foreign currency, the conversion is made at the rate of exchange prevailing at the date of the breach, and not at the date of judgment (*Di Ferdinando v. Simon* [1920] 2 K. B. 704 and [1920] 3 K. B. 409, *Burry v. Van den Hurk* [1920] 2 K. B. 709, *Lebeaupin v. Crispin* [1920] 2 K. B. 714, and *S.S. Celia v. S.S. Volturno* [1921] 2 A. C. 544). The applicants in the first summons contended that the latter principle does not apply to a claim in a winding-up, on the ground that the date of the winding-up order is fixed by the Companies (Consolidation) Act, 1908, as the date as on which the amount of a company's liabilities is to be ascertained, and that it is therefore as on the date of the winding-up order that the conversion into sterling should be made.

It is, however, clearly of the essence of the established principle, that the date as on which the liability is ascertained is not material for the purpose of fixing the date for conversion into sterling. The decision of P. O. Lawrence, J., affirmed by the Court of Appeal, against the contention

of the applicants in the first summons involves therefore, not an extension, but hardly more than a direct consequence of that principle.

The second summons is of greater interest, for it raises an additional question, with regard to which there has been uncertainty owing to conflicting *dicta*—whether the same principle applies to an action for the recovery of a debt payable in a foreign currency as to an action for damages. The applicants contended that the correct date for conversion into sterling of the amount of such a debt is, in an action, the date of judgment, and therefore in a winding-up, the date of the winding-up order. P. O. Lawrence, J., held that the correct date for conversion is the date on which the debt becomes due.

The only case previously reported bearing directly on this point is apparently *Scott v. Bevan*, 2 B. & Ad. 78; but it is the judgment in this case which has been the cause of the uncertainty. In *Manners v. Pearson* [1898] 1 Ch. 581, Vaughan Williams, L.J., took the view that an action for recovery of a debt payable in foreign currency should be treated as an action for damages for breach of contract to deliver that currency, and regarded the decision in *Scott v. Bevan* as consistent with that view. His judgment was, however, a dissenting one, and in the opinion of the majority of the Court the question did not then arise. A contrary view of the decision in *Scott v. Bevan* was taken by Roche, J., in *Di Ferdinando v. Simon* [1920] 2 K. B. 704, and by McCardie, J., in *Lebeaupin v. Crispin* (*supra*); but on appeal from the judgment of Roche, J. ([1920] 3 K. B. 409), all the members of the Court of Appeal expressly disagreed with the views stated by Roche and McCardie, J.J., on this point, and showed that *Scott v. Bevan* established that the date for conversion is the date when the debt becomes due. Though these observations of the learned Lords Justices were *obiter dicta*, the question would have appeared to have been settled; and in *Société des Hôtels du Touquet-Paris-Plage v. Cumming* [1921] 3 K. B. 459, the point came directly before Avory, J., who decided accordingly. The Court of Appeal ([1922] 1 K. B. 451), however, reversed his decision on another ground, without expressing an opinion on this point; but Atkin, L.J. (at p. 465), appeared to regard the question as still unsettled. Now, however, the question has been decided. It is to be noted that the decision is opposed to American opinion as expressed in *Marburg v. Marburg*, 26 Maryland 8, and in text-books; but these authorities were cited in all the English cases, and were deliberately disapproved.

A principle has therefore been established, common to actions for breach of contract, to actions for tort and to actions for recovery of debts, where the damages or amount due are assessed in foreign currency, that the damages or the amount of the debt should be converted into English currency at the rate of exchange ruling at the date when the cause of action arose, and not at the date of judgment.

This principle is stated to be based on the view that any loss due to changes in the value of the foreign currency subsequent to the default in payment, is too remote a consequence of such default to be taken into account by the Court (see *Di Ferdinando v. Simon* [1920] 3 K. B. 409, at p. 415, and *S.S. Celia v. S.S. Volturno*, *supra*, at p. 560). A party may, however, deliberately fail to fulfil his obligations to deliver foreign currency, in the expectation of benefiting, at the expense of the other party, by a change in the value of the currency. Could the loss so incurred be too remote a consequence of the default and “not sufficiently connected

with the breach as to be within the contemplation of the parties" (*Di Ferdinando v. Simon*, *supra*, at p. 416)? If damages cannot, even in such circumstances, be allowed to cover alteration in the rate of exchange, must there not be some other basis of the principle? It is suggested that it may be a particular form of general principles that a plaintiff must mitigate his loss by covering that loss as far as possible and as soon as he is aware of it, even if he can only cover by selling forward; and that he cannot therefore recover damages incurred by reason of his failure in this respect.

B. F. M.

NOTE.—Since the above note was written, a third summons in the winding-up of the same bank has been reported, dealing with a further aspect of the question. In *Re British American Continental Bank, Lim.; Lisser and Rosenkranz's Claim* [1923] W. N. 57, the applicants, a German firm, incurred a loss, assessed in German marks, by reason of the bank's failure to carry out a contract. After the applicants had lodged a proof in the winding-up for a sum in sterling, the liquidator of the bank tendered to them the amount of their loss in German marks in full satisfaction of their claim. German marks had depreciated since the breach of contract, and the applicants refused the tender. P. O. Lawrence, J., held that the applicants were not bound to accept the tender of marks, as according to *In re British American Continental Bank; Goldzeiher and Penso's Claim* (*supra*), they were entitled to be admitted as creditors in the winding-up for the value of the marks in sterling at the rate of exchange ruling at the date of the breach. This decision was affirmed by the Court of Appeal.

The applicants' claim was not for the marks which they had lost; it was for the damages they had incurred, assessed in sterling. Therefore, from the date of the breach they were entitled to a fixed sum in sterling. If, however, the claim had been to recover a debt payable in foreign currency, it appears that the position would have been otherwise. In that case the claim would remain one for foreign currency, and would, it seems, be satisfied by the payment of the original amount in that foreign currency (see *Société des Hôtels du Touquet-Paris-Flage v. Cumming* [1922] 1 K. B. 451), though in an action the creditor could obtain the value of the debt in sterling at the date when it became due (see *In re British American Continental Bank; Crédit Général Liegeois' Claim* (*supra*)).

B. F. M.

CHARITY—BEQUEST FOR TRAINING MEDIUMS—INVALIDITY.

In re Hummeltenberg; Beatty v. London Spiritualistic Alliance, Lim.
39 T. L. R. 203.

In this case there was a bequest to the London Spiritualistic Alliance, Lim., of £3,000 to be used in training and developing suitable persons as mediums—preferably for the healing and diagnosis of disease; but the bounty was not restricted to mediums of that kind nor indeed to mediums of any kind, for if it was found impracticable or unnecessary to develop mediums, there was a general direction that the Council of the Alliance should use the money in advancing the cause of spiritualism. There

was also a gift of residue to certain hospitals in London. The question was, whether the bequest of £3,000 constituted a good charitable gift. *Held*, by Russell, J., that it did not; that, in consequence, it failed and fell into residue.

"The legal meaning of charity . . . is neither dependent upon nor coterminous with its popular sense" (*Tudor on Charities*, IV ed., at p. 36). In defining the scope of charitable gifts the Courts must still turn for basic authority to the 43 Eliz. c. 4, an "Acte to redresse the misemployment of landes, goodes and stockes of money heretofore given to charitable uses." In the preamble to that Act is recited a number of charitable objects which appear in Com. Dig. (tit. "Charitable Uses") under the various heads of poor inhabitants, soldiers or mariners disabled, schools, bridges, orphans, houses of correction, poor virgins, decayed tradesmen, prisoners and captives. Comyns adds a further class of "other charities not superstitious." That the statute of Elizabeth had "received the most liberal, not to say in some instances the most extravagant, interpretation" (as Story puts it, *Eq. Jurisp.*, III ed., at p. 487) was fully admitted by Lord Eldon, who, however, added that only those purposes are charitable "which the statute enumerates or which by analogies are deemed within its spirit and intendment" (*Morice v. Bishop of Durham* (1804) 9 Vesey, at p. 405). In 1888 the Mortmain and Charitable Uses Act (51 & 52 Vict. c. 42) repealed the 43 Eliz. c. 4, but expressly saved (section 13, sub-section 2) the preamble to that Act. A step towards more adequate definition was taken by Lord Macnaghten who, proceeding from certain *dicta* of Sir Samuel Romilly arguing in *Morice's Case* (*supra*), distinguished four classes of charitable objects: (1) relief of poverty, (2) advancement of religion, (3) advancement of education, (4) other objects beneficial to the community—*Commissioners for Income Tax v. Pemsel* [1891] A. C. 531; but these classes, especially the fourth, are necessarily vague and have scarcely served to stem the tide of litigation upon this part of our legal system.

It was argued on behalf of the Alliance that there were four grounds upon which the gift might be held good. It was said, in the first place, that the gift was for the advancement of education—to train persons to pursue a lawful calling; in the second place, that it was beneficial to a section of the community—to those who intended to adopt the calling of mediums; thirdly, that it was beneficial to the whole community, as tending ultimately to the diminution of disease by increasing the number of therapeutic mediums; fourthly, that, as the intention of the donor was obviously to confer a benefit upon the public, the Court must not look behind his estimate of his own gift to enquire whether the community might benefit or not. In support of the last proposition, *In re Foveaux* [1895] 2 Ch. 501 and *In re Cranston* [1898] 1 Ir. Rep. 431 were cited. The first three propositions were adapted to Lord Macnaghten's classification in *Commissioners for Income Tax v. Pemsel* (*supra*), the first bringing the gift within class (3), the other two bringing it within class (4). Let us see how Russell, J., considered these arguments.

The learned Judge began with a statement of the fact (which, in the case as reported, was not adverted to by counsel on either side) that the gift was *prima facie* bad as creating a perpetuity. If, on the other hand, it could be shown that the gift was charitable, the rule against perpetuities would not apply. The onus of proof lay upon the Alliance to show that it was so.

For this purpose it was not sufficient to show that the gift *prima facie* fell within one or more of Lord Macnaghten's divisions. There is one general principle governing all of those divisions—that the gift must tend ultimately to the benefit of the community at large. The relief of poverty evidently tends in that direction—that was the central factor in the Elizabethan statute. The advancement of religion or of education may or may not have that tendency. A gift to instruct burglars in the more scientific branches of the art of house-breaking would advance education in a certain direction, but in a direction counter to the public benefit. Similarly a gift for the benefit of a particular section of the community will, as a rule, indirectly benefit the whole, but conceivably it may not. The Court must be satisfied that the gift is charitable in the broader sense as well as in the narrower. In the words of Chitty, J., in *Re Foveaux* [1895] 2 Ch., at p. 504, "to be a charity there must be some public purpose—something tending to the public benefit. The benefit in point of area need not extend to the public at large; a trust for the benefit of the inhabitants of a particular locality will suffice."

This evidence that the gift might operate for the public benefit was exactly what Russell, J., found wanting in the present case. Four affidavits had been filed—among them one from Sir Arthur Conan Doyle, another from Dr. Abraham Wallace—expressing belief in the powers of therapeutic mediums to expel disease; but even if this evidence were admitted, in which case benefit to the community would be clear, the gift must still fail because the wording left the Alliance free to expend the money upon others than mediums of that kind. So the third argument failed. Again, there was nothing to show that a mere advancement in spiritualistic education or a benefit to mediums as a class might ultimately inure to the benefit of the whole public, so that the first and second arguments failed also.

The fourth argument was of a different kind—that it was for the donor, not for the Court, to determine whether the gift was for the public benefit. One of the cases cited in support of this was an Irish case, *In re Cranston* [1898] 1 Ir. Rep. 431, in which Porter, M.R., after remarking that the Court should hold good an object not illegal in itself "unless there is some coercive reason to the contrary," declared that "whether an object of this sort is charitable or not does not depend on the private feeling or opinion of the judge who has to decide it." Now this seems to mean only that Judges must not allow themselves to be swayed by their personal prejudices as to what may or may not be for the benefit of the community. It is a salutary principle not by any means confined to this part of the law. "A judge," to use the words of Judge Cardozo (*Nature of the Judicial Process*, at p. 108), "would err if he were to impose upon the community as a rule of life his own idiosyncrasies of conduct and belief." *In re Cranston*, for example, was a case of a gift to two vegetarian societies; such a gift must not be held bad simply because the Judge happens to be a convinced anti-vegetarian. In the other case cited, *In re Foveaux* [1898] 2 Ch. 501—a gift to an anti-vivisection society—Chitty, J., seems to go somewhat further. He says, at p. 507, "the intention is to benefit the community: whether if they (the Society) achieved their object the community would in fact be benefited is a question on which I think the Court is not required to express an opinion." Now, in the first place, though this does not seem very material, the reference here is to the donee's intention, not to that of the

donor, but, secondly, to say that the Court will not insist upon exact evidence that the community would in fact be benefited, is not to exclude the requirement of proof that the community might be benefited. Whether Chitty, J., meant to draw this distinction is not quite clear. Russell, J., in the present case laid it down that though the private opinion of the Judge was immaterial, still "the question whether a gift was or might be operative for the public benefit was a question to be answered by the Court by forming an opinion on the evidence before it." Otherwise the Court might be compelled to hold a gift for training poodles to dance as beneficial to the community simply because a testator said that it was so.

The gift, then, was invalid because it was not a charitable gift, but there was yet another ground upon which it was invalid—it was not such a gift as the Court could administer or control. The co-existence of these requirements is clearly shown by the following words of Lindley, L.J., in *Re MacDuff* [1896] 2 Ch., at p. 463: "We must get at something sufficiently definite to guide the Court as to the kind of trust which it has to execute, and that trust must be of a kind called technically a charitable trust." Russell, J., held that upon the evidence the gift was not definite enough to be controlled by the Court.

The grounds of the decision, then, were that (1) the gift *prima facie* created a perpetuity, that (2) it was not saved by being charitable and that (3) even if it had been, it would still fail because the Court could not administer or control it. But it seems important also to note here three grounds upon which the case was *not* decided. In the first place, no opinion was expressed upon the question of impossibility—whether mediums are really born and not made. Secondly, the learned Judge refused to lay it down that the gift was invalid as *contra bonos mores*. Finally, the question of illegality was likewise expressly excluded. Counsel had argued that the gift might be invalid under the Vagrancy Act, 1824 (5 Geo. IV. c. 83, s. 4), which includes in a category of persons liable to three months' imprisonment "every person pretending or professing to tell fortunes or using any subtle craft, means, or device, by palmistry or otherwise to deceive or impose on any of His Majesty's subjects." A note in *Chitty's Statutes* includes "Spiritualism" among the alternatives to palmistry within the Act, citing *Monck v. Hilton*, 36 L. T. 66, and *Reg. v. Lawrence*, 36 L. T. 402; but in both of these cases the jury had found imposture, and in the former Cleasby, B., at p. 63, after declaring that he was not called upon to express any opinion upon the subject of spiritualism in general, stated that "such a subject would be a very improper one for argument in a Court of Law." The question may be regarded as open, and Russell, J., as we have said, refused to express an opinion on it.

A. D. S.

CHARITY—BEQUEST FOR PATRIOTIC AND CHARITABLE OBJECTS—INVALIDITY.

Re Tetley; National Provincial and Union Bank of England v. Tetley.
The Times, Nov. 10, 1922.

THIS was a case of bequest upon a "purpose" trust. By his will, Henry Greenwood Tetley left one-fifth part of his residuary estate, which, it was estimated, would amount to about £200,000, to trustees "to devote

and apply the same for such patriotic purposes or objects and such charitable institution or institutions or charitable object or objects in the British Empire as my trustees may in their absolute discretion select, in such shares and proportions as they shall think proper." *Held*, by Russell, J., that the gift of one-fifth of the residue was void for uncertainty.

The rule of law relating to gifts of this kind is expressed as follows by Davey, L.J., in *Hunter v. Attorney-General* [1899] A. C., at p. 323, "where charitable purposes are mixed up with other purposes of such a shadowy and indefinite nature that the court cannot execute them, or where the description includes purposes which may or may not be charitable (such as 'undertakings of public utility') and a discretion is vested in trustees, the whole gift fails for uncertainty." In effect, the rule seeks an adjustment between the natural expectations of the testator's relatives and the benefit of the whole community or of a part of it. Where the object is charity, the Courts will uphold a gift in very wide terms. "There is no better rule," said Loreburn, L.C., in *Weir v. Cume Brown* [1908] A. C., at p. 167, "than that a benignant construction will be placed upon charitable bequests." Where, on the other hand, a discretion is vested in trustees to choose between objects which are charitable and objects which are not, so vague a disposition will not be allowed to defeat the interests of the testator's kindred.

So much for general principles. The judgment of Russell, J., in this case dealt with three particular points in connection with Tetley's bequest.

The first of these was a point of construction. It had been argued that the words of the gift must be read conjunctively as directing the trustees to choose only such objects as were either charitable simply or charitable in addition to being patriotic. In *Re Pardoe*, a gift to "public charities and institutions or charitable purposes for the public advantage," was held good by Kekewich, J., on the ground that the trustees were confined to objects which were charitable in addition to being public ([1906] 2 Ch. 184). The learned Judge in the present case, however, ruled that the words must be read disjunctively, as conferring upon the trustees a choice between charitable and patriotic objects.

That being so, it was necessary to settle the more difficult question of definition. Are patriotic purposes necessarily "charitable"? The law of England has placed a very wide construction upon that word. In the words of Maitland (*Equity*, at p. 51), "the scope given to the word 'charitable' nearly equals any purpose conceived to be directly beneficial to the public or some class of the public." The difficulty, as the same writer continued to remark, is to know where to draw the line. In the celebrated case, *Commissioners for Income Tax v. Pemsel* [1891] A. C. 531, Lord Macnaghten distinguished four classes of charitable objects—relief of poverty, advancement of religion, advancement of education, and a residuary class of objects beneficial to the community. What objects may be said to fall within the residuary class? This question arose with respect to the word "public" in *Blair v. Duncan* [1902] A. C. 37, where it was held that public objects were more extensive than charitable objects. But the question of the import of the term "patriotic" did not arise until the present case, and it might have been thought that patriotic objects are objects beneficial to the community. The learned Judge, however, ruled that although there were some patriotic objects which were charitable, there were others which were not; he instanced the assistance of the Prime

Minister for the time being by paying his income tax. The discretion vested in the trustees was therefore too wide.

In conclusion, Russell, J., dealt with a suggestion by the Attorney-General that the gift was valid as a gift for the benefit of a locality mentioned in the will—the British Empire. The only authority to be adduced in support of this proposition was a *dictum* of Lord Romilly, in *Dolan v. Macdermoth* (5 Eq. 60), which had not been followed in subsequent cases. Moreover, the “locality” involved in that case was a small Devonshire parish, and so recently as 1918, in *Houston v. Burns*, A. C. 337, where there was a gift to “public benevolent or charitable purposes” in the parish of Linlithgow and the neighbourhood, it was laid down by Finlay, L.C., that “the purpose is too vague, and the vagueness of the purpose is not cured by the specification of the locality to be benefited.” *A fortiori* in the present case, Tetley’s bequest could not be sustained upon this ground.

A. D. S.

This decision of Russell, J., was upheld in the Court of Appeal (Lord Sterndale, M.R., Warrington and Younger, L.JJ.), *The Times*, Feb. 14, 1923.

A. D. S.

SOLDIER’S WILL—LACK OF TESTAMENTARY INTENTION.

In re Beech; Beech v. Public Trustee and Others. 39 T. L. R. 88

COLONEL BEECH had powers of appointment over two estates, Shawe and Brandon, of which he was tenant for life. While on active service in March, 1918, he wrote to his son a letter, in which the following words appear: “When I told you about Shawe going to you after me, I should have said that Kitty (the writer’s daughter) will be able to use the house if she wishes during her lifetime. . . . I take it Brandon will be sufficient for a residence for you and Clare” (the son’s wife). Another letter of the same month had been lost. The son in his evidence said it contained, as far as he could remember, the following words: “I daresay you would like to know I have left you after me both the Brandon and Shawe Estates.”

The son claimed in this action to have both these letters admitted to probate. The Court of Appeal, affirming the decision of Salter, J., held that the letters could not be admitted to probate, as lacking testamentary intention, the need for which still remains even in the will of a soldier on active service, though such a will is exempt from the requirements of the Wills Act, 1837, as to form.

A soldier’s will seems to be in the same position as regards form as that of a civilian before the Statute of Frauds (the authorities may be found at length in *Godman v. Godman* [1920] at p. 261, *per* Scrutton, L.J.). It may be written and unattested or even verbal before witnesses. If written, it need not be signed, for Blackstone says of wills before the Statute of Frauds: “Bare notes in the handwriting of another person were allowed to be good wills.”

On the other hand, the need of testamentary intention still remains, and nothing can be admitted to probate which was not intended to be a testamentary act. To constitute a testamentary act, the document or

spoken words must be a definite expression of the testator's wishes as to the destination of his property after his death. In the present case the letters were not expressions of what the testator wished to be done with his property, but mere statements of what he thought he had done.

S. E. W. B.

WILL AND CODICIL—DISPOSITION OFFENDING AGAINST A RULE OF LAW—
PERPETUITIES—EVIDENCE AS TO CHILD-BEARING AGE—"BROTHERS
AND SISTERS"—DEPENDENT RELATIVE REVOCATION.

In re Burnyeat; Burnyeat v. Ward. Before the Court of Appeal,
Feb. 22 and 23, 1923.

THIS case, which has not yet been reported, raises two questions, the admissibility of evidence that a woman is past child-bearing age in connexion with the rule against perpetuities and the question of dependent relative revocation. Also the extent was considered to which extrinsic evidence may be admitted to construe a gift in a will to "brothers and sisters" as meaning a gift to those brothers and sisters living at the date of the testator's will (or codicil), or in other words whether "brothers and sisters" can be construed as *personæ designatæ*.

By his will, a testator gave his wife a life interest in his estate and, in default of issue, a power of appointment as to the remainder amongst "the children of my brothers and sisters," and in default of such appointment amongst such children equally. By a codicil the testator directed that the life estate given to his wife should be determined on her remarrying any person other than a British subject by birth, and he expressly revoked the power of appointment given to his wife by his will, and directed that after the death of his wife his trustees should "stand possessed of his residuary trust funds in trust for all or any of the children or child of my brothers and sisters who shall be living at the death of my wife or born at any time afterwards before any one of such children for the time being in existence attains a vested interest and who being a son or sons attain the age of twenty-one years or being a daughter or daughters attain that age or marry if more than one in equal shares."

The testator died without issue on May 7, 1916, and left surviving him his father (who died June 28, 1921) and his mother (who is still alive), both being then 66 years of age. He also left two brothers and two sisters (the youngest aged thirty-two years), all of whom had issue, the eldest of which issue was born on June 19, 1902, and is still living. Subsequently the testator's wife married a Dutch subject.

In the Court of first instance (November 8, 1922) P. O. Lawrence, J. held that no evidence that a woman was past child-bearing age is admissible in applying the rule against perpetuities, that the term "brothers and sisters" could not be limited to designated persons, and that the trust contained in the codicil in favour of the children of the testator's brothers and sisters was therefore void for remoteness. The result of this remoteness and of there being no express revocation of this trust in the will was, he held, that the gift to the testator's wife under the codicil determined, and that the gift in the will to the children of his brothers and sisters came into operation, so that the children of the brothers and sisters took equally

shares vested in interest at the date of the re-marriage (*Re Mason*; *Mason v. Mason* [1910] 1 Ch. 695, C. A.).

The testator's widow appealed on the ground that the will was revoked by the subsequent inconsistent gifts in the codicil, and that there was therefore an intestacy. This appeal was allowed by the Court of Appeal; Atkin, L.J., dissented because his views on the cross-appeal (below) rendered such dissent necessary; he stated, however, that otherwise he would have agreed with the majority of the Court on this point.

A cross-appeal was also lodged by certain of the beneficiaries, on the grounds, shortly, that the term "brothers and sisters" was limited by the context to those brothers and sisters living at the testator's death, or at the date of his will. The majority of the Court (Lord Sterndale, M.R., and Warrington, L.J.) dismissed this appeal, Atkin, L.J., dissenting and holding that the appeal ought to be allowed on the ground that there was sufficient context to limit "brothers and sisters" to *personæ designatæ*.

All the members of the Court were of opinion that to explain the words "brothers and sisters," as used in the will, extrinsic evidence as to incapacity as to child-bearing was admissible, provided there was sufficient context, in order to explain, not the testator's intention, but his meaning.

The following cases were cited both in the Court of first instance and in the Court of Appeal as to the admissibility of evidence in regard to a woman being past *child-bearing* in relation to the rule against perpetuities: *Jee v. Audley* (1787) 1 Cox Eq. Cas. 324; *Re Sayon's Trusts* (1868) L. R. 6 Eq. 319; *Re Dawson*; *Johnston v. Hill* (1888) 39 Ch. D. 159. The Court of Appeal held that whenever a testator uses some phrase (here "brothers and sisters") the meaning of which is doubtful, extrinsic evidence is admissible to explain such meaning, but not to explain the testator's intention. This view, in which the members of the Court were unanimous, does not definitely overrule the principles of *Re Dawson* (*supra*), but shows the rule therein expressed to be subject to the rules as to extrinsic evidence for the interpretation of wills. Atkin, L.J., in this connexion quoted and approved *Re Mervin* [1891] 3 Ch. 200, and the judgment of Lord Blackburn in *River Wear Commissioners v. Adamson* (1877) 2 A. C. 643, 763, and affirmed that the views expressed by Lord Blackburn on this point in that case concerning an Act of Parliament were equally applicable to a will.

To sum up the situation: Given clear words of description, extrinsic evidence is not admissible (following *Re Dawson*, *supra*); given any doubtful meaning, extrinsic evidence is admissible (following *River Wear Commissioners v. Adamson*, *supra*, at p. 764, first paragraph), provided always that there is some context enabling the Court to construe the description.

Even if the gift to the "children of my brothers and sisters" did not offend against the rule in *Cadell v. Palmer*, for the reason of the possible event that the parents might have further children who might have issue, so that their shares might not be ascertainable within the period, it still is an infringement of the rule owing to the further possibility that the testator's mother might die after his death, that the *father might re-marry* and have further issue, and these issue, as half-kin of the testator, would come under the description of "brothers and sisters": *Grieves v. Rawley* (1852) 10 Ha. 63, and see quotation (below) from the judgment of Warrington, L.J.

The argument raised on the cross-appeal, therefore, was that "brothers

and sisters" designated the brothers and sisters living at the date of the testator's will or, perhaps, death.

Warrington, L.J., stated that "brothers and sisters" were "words of a comprehensive meaning," and denoted "children of my parents or of one of them," and added that there existed nothing in the circumstances nor the context to limit the words to *personæ designatæ*.

The judgment of Atkin, L.J., raised several points of interest; he stated that the rule as to non-admissibility of evidence of a woman being past child-bearing age was judge-made law, and, though it bound the Court, it was not binding on the testator when he was writing and interpreting to himself the words of his will. He continued that the phrase in question referred to those four persons whom the testator had for thirty-two years meant by the expression "brothers and sisters," and only to those four, so that half-kin were excluded. He was of opinion that there was sufficient in the context to show that the phrase was of the same effect as though the testator had named his several brothers and sisters.

On the question of *dependent relative revocation* the Court held that every case rested on its own merits and on the proof of *animus revocandi*, and consequently that there was here a partial intestacy. No principle was laid down, though the general tenor seemed to be that, where a codicil impliedly revokes gifts in a will and that codicil offends against some rule of law, the gifts in the will do not come into operation, or, as is loosely stated, do not revive. The general statement of the law in *XXVIII. Laws of England* 567 was disapproved by Warrington, L.J., as being too wide a statement.

In view of the divergence of opinion in the Court of Appeal, of the general uncertainty on the latter question, and of the development of the views as to admissibility of evidence affecting the rule against perpetuities, it is greatly to be hoped that the parties will carry this case farther.

H. G. M.

EXTRADITION—MEANING OF "FUGITIVE CRIMINAL"—APPLICATION FOR WRIT OF HABEAS CORPUS.

Rex v. Godfrey. [1922] 1 K. B. 24.

GODFREY was partner in a firm the other members of which had, with his connivance, visited Switzerland and there committed the misdemeanour of obtaining goods by false pretences. Godfrey was therefore liable as principal, though he had never been in Switzerland at the time of the offence or subsequently. The point for the consideration of the Court was whether or not Godfrey, who had never been in Switzerland and hence, *prima facie*, could not be a *fugitive criminal*, was in fact, under the construction of the Extradition Act, 1870, a "fugitive criminal."

There is really not very much difficulty about the decision, because in section 26 of the Extradition Act, 1870, there is a conclusive interpretation of the words "fugitive criminal." The section reads as follows: "The term 'fugitive criminal' means any person accused or convicted of an extradition crime committed within the jurisdiction of any foreign state who is in or is suspected of being in some part of His Majesty's dominions; and the term 'fugitive criminal of a foreign state' means a

fugitive criminal accused or convicted of an extradition crime committed within the jurisdiction of that state."

The Court held in this case that "fugitive" simply meant "trying to avoid the results of his crime—seeking to escape from the penal consequences of his act." Godfrey was refused a writ of *habeas corpus*. *Reg. v. Nillins* (1884) 53 L. J. M. C. 157 upheld.

H. M. A.

CRIMINAL LAW—PRESUMPTION OF COERCION OF MARRIED WOMEN.

R. v. Peel. The Times, March 14 and 15, 1922.

MRS. PEEL, wife of Captain Owen Peel, was charged with her husband on March 7, 1922, with endeavouring to obtain money from bookmakers by means of forged telegrams. Captain Peel pleaded Guilty, but his wife, Not guilty. After some legal discussion it was decided by Darling, J., that the case against Mrs. Peel must go on. She was accordingly tried on March 13 and 14 at the Central Criminal Court. Counsel for the defence contended, firstly, that there was no evidence against Mrs. Peel to go to the jury, and, secondly, that there was no evidence to go to the jury to rebut the presumption of law that she was acting under the coercion of her husband. It is in the latter objection that the interest of the case lies, and on the strength of it Mrs. Peel was discharged.

The learned Judge, in his summing-up, reviewed the history of this presumption, and in the course of the trial the whole law relating to it was fully discussed. At the time of the trial the law relating to it appeared to be as follows:—

In the case of crimes committed by a wife in the presence of her husband, the presumption of coercion which excuses the wife applies to all felonies save those of treason and murder, and to all misdemeanours. But the *prima facie* presumption which this doctrine raises may be rebutted by evidence to the contrary, and should it appear that the wife has done some act independently of her husband, from which it may be inferred that she was acting voluntarily, it is for the jury to decide whether, in the case in point, she was in fact so acting voluntarily, or under the coercion of her husband. Emphasis may be laid on the necessity of the act being committed "in the presence of her husband." It is not enough that she was acting on his order in his absence.

Applying these considerations to the present case, it was therein proved that Mrs. Peel was betting on her own account, in her own code name, and on the strength of her own separate banking account. On the day in question she wrote out telegrams backing a horse which had won a race at Kempton Park, and her husband fraudulently handed them in at a post office at a time when he might have known that the horse in question had already won the race. Mrs. Peel went with her husband to the post office, and was telephoning from there to some person who might have told her the winner of this race, but she was all the time in verbal communication with her husband. The result of the fraud was that she won money from the bookmakers who were the recipients of the telegrams.

The learned Judge held that there was no evidence here to go to the jury to rebut the presumption that she was acting under the coercion of her husband. On the contrary, everything she did was done in her husband's

presence, and probably by pre-arrangement with him, this latter fact, as the learned Judge pointed out, having actually been held to be evidence of coercion. He therefore ordered an acquittal, though satisfied that Mrs. Peel had not in fact acted under her husband's coercion.

This case served to point out the absurdity of this presumption of coercion, and some change in the law seems obviously desirable. This change might take either the form of abolishing the presumption of coercion, leaving coercion as a defence in the ordinary way, or the abolition of the entire doctrine of coercion, leaving the wife free to establish any defence of compulsion (such as fear of immediate death or grievous bodily harm) which is open to any person save in the case of certain specified crimes.

In the Criminal Justice Bill, now, at the time of writing, before the House of Lords, clause 24 reads as follows:—

(1) Any presumption of law that an offence committed by a wife in the presence of her husband is committed under the coercion of the husband is hereby abolished.

(2) This section shall come into operation on the passing of this Act.

In the debate in the House of Lords on March 9, Lord Parmoor moved to substitute the following new clause:—

“The whole doctrine of coercion by the husband as a defence for the wife is hereby abolished, and a wife shall be in the same position as other people, free to establish any defence of that kind of compulsion which affords a defence to any person except in the case of certain specified crimes.”

But the Lord Chancellor said his object was to abolish the presumption, and he could not accept the proposed alternative clause.

T. C. H.

DIVORCE—EVIDENCE AND PROOF OF ADULTERY—RIGHT OF INTERVENER TO APPEAL—MARRIAGE AS A CONTRACT—JUDICATURE ACT, 1881.

Rutherford v. Richardson. 39 T. L. R. 42.

THIS was an appeal by Mrs. Rutherford, wife of Colonel Rutherford, against an order of the Court of Appeal (38 T. L. R. 353) rescinding a decree *nisi* for dissolution of marriage granted by Branson, J., on June 14, 1921.

In August, 1920, the appellant presented a petition for divorce from her husband on the grounds of his cruelty and adultery with Miss Amy Richardson. The petition was served on Colonel Rutherford at Broadmoor Criminal Lunatic Asylum, where he was confined for the murder in 1919 of Major Seton, but he did not defend the suit. Miss Richardson intervened and denied the adultery.

Branson, J., found both cruelty and adultery proved, and granted a decree *nisi*. Miss Richardson appealed. The Court of Appeal was not satisfied with the proof of adultery, and held that the decree *nisi* could not stand (*The Times*, July 20, 21, and 24, 1921). Mrs. Rutherford thereupon appealed to the House of Lords.

The chief interest of the case lies in the lucid explanation by the Lord Chancellor (Lord Birkenhead) of the following apparent anomaly. B, a wife, petitions for a divorce from her husband, A, on the ground of his

alleged adultery with a named co-respondent. C. There is some independent evidence against both A and C, but not enough to amount to proof of adultery. C denies the adultery, but A confesses to it. This, by the rules of evidence, is proof against A of his adultery with C, but is absolutely no proof against C of her having committed adultery with A.

The explanation lies in the necessity, in the interests of justice, for rigid rules of evidence. "For," said Lord Birkenhead, "it is better that some slight degree of injustice should be done in an individual case than that the Courts should abandon the sure anchorage of a dependable rule."

If A confesses to the alleged adultery, in the face of some independent evidence against him, it is reasonable to allow his confession to be binding on him. But it is quite unreasonable to allow such confession to bind the alleged co-respondent, for the confession may be quite untrue and based on hidden motives. It may thus happen that by following the strict rules of evidence the Court may declare itself satisfied that A has committed adultery with C, while of the opinion that the evidence is wholly insufficient to prove that C committed adultery with A. Such a finding, as the learned Lord Chancellor pointed out, merely amounts to a verdict, not recognized in England, of Not Proven against C.

But another case may be taken, going one step farther. For the Court may not only consider the evidence against C insufficient, but may be positively satisfied of her entire innocence. In this case the positive proof of C's innocence overrides the negative admission of A, and as the two are incompatible, the effect of the admission is destroyed.

Applying this to the case in point, Colonel Rutherford's admission of adultery with Miss Richardson only bound himself, and not her. Furthermore, in the event of the Court declaring itself satisfied with her entire innocence, this positive proof precluded the effect of Colonel Rutherford's confession. But the Court did declare itself entirely satisfied with Miss Richardson's innocence, and the husband's admission was therefore of no effect. It followed that the decree *nisi* could not stand. For "marriage is more than a simple contract between spouses, or a thing which they can dissolve by their own acts and choice. It is a status involving other interests, and the statutory power of dissolving it depends on the Court's being satisfied that adultery in fact took place."

With regard to the right of an intervener to appeal, her right rested on the fact, as laid down by the Lord Chancellor in his judgment, that marriage, though a contract, was something more. Lord Wrenbury, in his dissenting judgment, did not agree that an intervener had any right to appeal, and was for restoring the decree *nisi*. "Marriage was a contract; that contract was by statute capable of being determined. But a contract between A and B could not be determined at the instance of C and in the absence of A." This was Lord Carson's opinion, but there was a majority for the view expressed by Lord Birkenhead.

Another point of law was raised as to whether or not the case was within the jurisdiction of the House of Lords by reason of the operation of section 9 of 44 & 45 Vict. c. 68. This enacts that the decision of the Court of Appeal in divorce and matrimonial causes shall be final, except where the decision is, *inter alia*, upon a petition for dissolution of marriage. *Held*, that the case clearly fell within the exception, and that the House of Lords had therefore jurisdiction.

In delivering judgment, the learned Lord Chancellor commented on the harshness and inhumanity of the law, but as there was no doubt in his

mind that such was the law, no option was left to him but to enforce it. The appeal was therefore dismissed.

T. C. H.

HUSBAND AND WIFE—WIFE'S TORTS—LIABILITY OF HUSBAND.

Edwards and Another v. Porter and Wife. 39 T. L. R. 124. *McNeill v. Hawes.* 39 T. L. R. 167.

THESE two cases, which were decided within a few days of one another, have sufficient intrinsic similarity to make it well worth while considering them together. Moreover, in deciding the latter case, Lush, J., in his judgment, saw fit to distinguish the case of *Edwards v. Porter* from that with which he was dealing.

(1) *Edwards and Another v. Porter and Wife.*

Plaintiffs claimed £350 as money lent. The wife, representing herself to be acting on behalf of her husband, borrowed the sum claimed. The husband disclaimed any such agency, and, in fact, there was none. There is no difficulty about the liability of Mrs. P. either in tort or contract, but what of the husband?

- (1) Clearly the husband is not liable in contract, because the wife was not acting as his agent, express or implied.
 - (2) Generally speaking, by the common law a husband is liable for his wife's torts during coverture.
 - (3) But this does not apply where, for example, the tort of fraud is committed to induce a contract and does in fact induce such a contract; or, indeed, where the tort arises essentially as part of a contract—e.g., *Cole v. de Trafford* [1917] 1 K. B. 911, where a husband was held not responsible for personal injuries to his wife's servant, due to her negligence.
 - (4) A false representation whereby credit is obtained is by its very nature more fit to be classed with contract than with tort: *Wright v. Leonard* (1861) 11 C. B. (N. S.) 258.
 - (5) Thus, though a husband is liable for *naked* torts (i.e., those which are not in any way connected with contract) he is not liable for a fraud of his wife if such fraud be directly connected with a contract entered into by her: *Liverpool Adelphi Loan Association v. Fairhurst* (1854) 9 Ex. 422. Held, no action against Mr. Porter.
- (2) *McNeill v. Hawes.*

Hawes lent one Holmes £87 on the strength (among other things) of an insurance policy belonging to Mr. McNeill. Mrs. McNeill had signed her husband's policy with his name as follows:—"Please hold my policy for £200 as collateral security for promissory note signed by H. Holmes this day to yourself.—H. H. MCNEALL." Holmes absconded. Mr. McNeill sued for the return of his policy, which he obtained, and Hawes counterclaimed against the husband for the £87.

Held, that as there was no privity of contract between the plaintiff's wife and the defendant, the tort was a *naked* one and therefore the husband was liable.

The law as regards husband and wife both in tort and contract may be conveniently summed up as follows:—

Contract.

Every contract now made by a married woman, otherwise than as agent, binds her separate estate (M. W. P. Acts).

The husband is only liable for his wife's contracts when she acts as his agent, express or implied; this includes such agency as is necessitated by such circumstances as where a husband refuses to supply his wife with necessaries, called agent of necessity.

Tort.

- (1) A married woman is liable in tort as if she were a *feme sole*.
- (2) An action will lie against her husband (who may be jointly sued with the wife) in the case of all torts committed by her during coverture. This is the common law position, and is untouched by the M. W. P. Acts (*Seroka v. Kattenburg* (1886) 17 Q. B. D. 177; *Earle v. Kingscote* [1900] 2 Ch. 585).
- (3) This liability extends to fraud also, but not if the fraud is intrinsically part of a contract to which the wife is a party (*Edwards v. Porter*, (*supra*)).
- (4) Were this not the case, whenever a wife purported to act as her husband's agent, when in fact she was not so, then, although there would be no action against the husband in contract, yet an action would lie against him for the wife's tort of deceit in procuring the contract.
- (5) But where the wife's fraud induced a contract between the plaintiff and a third party (and presumably where the wife while in fact acting as her husband's agent used fraud), then the tort is a naked one and the husband is liable (*McNeill v. Hawes* (*supra*)).

The following *dictum* in *Earle v. Kingscote* [1900] 2 Ch. 585, at p. 591, sums up the law very concisely:—"The general rule of law appears to be clear and unquestioned—that a husband is liable for his wife's frauds as well as for other torts committed by her during coverture. That being so, a qualification was put on the rule so far as regards frauds or other torts embraced in a contract. It was said that where you cannot separate the fraud or other tort in respect of which you are suing from the contract, you cannot by framing your statement of claim in the shape of tort, turn that which is essentially a contract into a tort, so as to let in the liability of the husband when the two are inextricably mixed together."

H. M. A.

EDITOR'S NOTE.

Edwards v. Porter and Wife (on appeal). 39 T. L. R. 358.

Decision of Bailhache, J., affirmed (Bankes and Scrutton, L.J.J.; Younger, L.J., dissenting).

The salient points in the dissenting judgment of Younger, L.J., are:—
 (1) If defendant is liable it is by the survival of an old rule of law which is not altered by the Married Women's Property Act, 1882.

(2) The case must be treated in the same way as it would have been before 1880 (*Cuenod v. Leslie* [1909] 1 K. B. 885)

(3) The husband is joined with the wife for the sake of conformity, because the wife could not be sued alone.

(4) The question to be determined is whether the wife is liable for such a tort, because if she is the husband will be liable also.

(5) The husband is not liable for torts which are not *naked*—i.e., torts which are closely connected with contract, because the wife herself would not be liable for those torts; otherwise an action for deceit would lie as an alternative for an action in contract. Had these excepted frauds not been so favoured, a married woman would have lost the protection which the law gave her during coverture.

(6) These frauds were strictly limited to those “directly connected with the contract with the wife, and have been the means of effecting it and parcel of the same transaction.”

(7) Here the plaintiff intended to contract with the husband through the wife. There is, therefore, a naked tort and the husband is liable.

If Younger, L.J.’s contention is right, we seem to be faced with the following anomaly:—

If A (the wife), representing herself to B as acting on behalf of her husband C, buys a motor car when in fact she has no such authority, and then sells the motor car for her own profit, B can sue A in contract (under Act of 1893), or in tort for deceit; he could sue C in tort but not in contract, and would thereby be enabled in reality to enforce the contract by means of an action for tort.

McNeill v. Hawes. (Appeal allowed. Bankes and Scrutton, L.J.J.; Younger, L.J., dissenting). 39 T. L. R. 362.

The appeal was allowed in this case, on the ground that the fraud was directly connected with the contract with the wife and was parcel of the same transaction. It was held that the wife’s tort was not a naked one, and the husband was therefore not liable. There was an implied contract between the wife and the lender because of “the representation by the wife to the intending lender, consisting in her writing her husband’s signature and handing it to the intending borrower to be by him handed to the lender, and the intending lender acting on the representation.”

H. M. A.

COLLISION AT SEA—CONTRIBUTORY NEGLIGENCE.

Commissioners for Executing Office of Lord High Admiral of the United Kingdom (appellants), and *Owners of s.s. “Volute”* (respondents).

[1922] 1 A. C. 129.

THIS was an appeal from the Court of Appeal upon a question of contributory negligence at sea. The accident occurred on the night of April 17-18, 1918. The *Volute* was the leader of a convoy of three merchant vessels. The *Radstock*, one of the destroyers in charge, was on the starboard hand of the *Volute*. The *Volute* had instructions (1) to alter her course seven points to starboard upon reaching a particular spot, (2) to sound the appropriate helm signal upon doing so. The *Volute* duly carried out the first part of her instructions, but whether or not she signalled (evidence thereupon was conflicting) the *Radstock* steamed

straight ahead, and danger of collision arose. Upon discovering this, the *Radstock* hard-a-ported, but her helm jammed. As a last resort to avoid collision, the *Radstock* increased her speed from 8 to 18 knots, and it was while she was thus going full speed ahead that the collision occurred, although the *Volute* had then stopped and reversed her engines.

Action was brought against the owners of the *Volute* to recover part of the damage done to the *Radstock*. In the Admiralty Division, Sir Henry Duke, P., found that the *Volute* had in fact signalled, and that the *Radstock* was solely to blame. In the Court of Appeal, no opinion was expressed in the matter of the signal, but it was held that the *Radstock* was solely to blame whether the *Volute* had signalled or not. The Commissioners thereupon brought this appeal. The House of Lords (Lord Birkenhead, L.C., Lords Finlay, Shaw of Dunfermline, Phillimore and Cave) held that it was a case of contributory negligence, and allowed the appeal.

The old Admiralty rule in these cases as laid down in *The Milan* (1861) Lush., at p. 398, is that the party proceeding may recover a moiety of the damage even though guilty of contributory negligence, and that if there is a cross-action, the damages are divided and each party recovers half of his own loss. This rule has been modified by the Maritime Conventions Act, 1911, s. 1, which declares that where it is possible to establish degrees of fault, liability for damage shall be proportionate to the fault. The whole principle, in the words of Sir John Salmond (*Torts*, ed. v., at p. 51), "is probably a nearer approximation to ideal justice than the rule of the common law" under which, of course, the plaintiff recovers nothing. It must, however, be remembered that the principles invoked to establish contributory negligence (as opposed to those which determine liability for damage ensuing thereupon) are substantially derived from the common law—among them the celebrated rule in *Davies v. Mann* (1842) 10 M. & W. 546.

The judgment of Viscount Birkenhead, L.C., dealt first of all with two questions of fact. He held that there was sufficient evidence that (1) the *Volute* actually stopped and reversed her engines before the collision, but also (2) that the *Volute* had not sounded the helm signal, and was negligent in not doing so. There was, on the other hand, no doubt that the *Radstock* was negligent in increasing her speed. The point to be decided then, was whether the negligence of the *Volute* contributed, in the legal sense, to the accident so as to render her owners liable to pay part of the damage done to the *Radstock*.

The Lord Chancellor approached this question by distinguishing three possible cases:—

(1) The plaintiff has been negligent, but the defendant, having the last opportunity of avoiding the accident, has been subsequently and severably negligent. This was the case in *The Sans Pareil* [1900] P., p. 267, and in *The Hero* [1911] P., p. 128, and also in *Davies v. Mann* (1842) 10 M. & W. 544. If I negligently (and even illegally) leave my ass tethered in the highway, this does not disentitle me to recover from a person who comes along later and negligently drives a horse and waggon into the ass. We should add here, in accordance with *British Columbia Electric Railway Co. v. Loach* [1916] A. C. 719, that the defendant will not be allowed to assert that he had not in fact the last opportunity if he would have had it had he not disabled himself by some prior act of negligence. The essential requirement is that it be possible to draw a clear line between

the negligence of the plaintiff and that of the defendant. If this can be done, there is in law no contributory negligence, and the plaintiff may recover his whole damage whether the accident be at sea or on land.

(2) The defendant has been guilty of negligence, and his negligence has made danger so threatening as to leave the plaintiff without sufficient time to consider suitable measures for averting it. If under such circumstances the plaintiff takes a false step and the accident immediately results therefrom, this cannot be pleaded in defence. Cases of this type were *The Bywell Castle* (1879) 4 P. D. 219, and *The Tasmania* (1890) 15 A. C. 226. Here again, at sea or on land, the plaintiff may recover his whole damage.

(3) Cases midway between these two, being cases of contributory negligence in the legal sense. Here the plaintiff at common law can recover nothing, but in Admiralty law can recover either half of his damage or, if degrees of blame be established, damages proportionate to the degree of fault of the defendant. Cases of synchronous negligence are clearly within this category. That they are not the only cases seems obvious enough. In the case of accidents at sea, this seems to follow from the very words of the Maritime Conventions Act, 1911, s. 1, with reference to degrees of blame in cases of contributory negligence.

In fact, the Lord Chancellor held that the present case fell within the third of these divisions. The *Radstock* had clearly been negligent, and she had not been negligent under such circumstances as to exempt her from blame under the *Bywell Castle* rule. On the other hand, the case could not be brought within the first division, because it was impossible to draw a clear line between the negligence of the *Volute* and that of the *Radstock*. There was not, in the words of the Lord Chancellor, "a sufficient separation of time, place, or circumstance" between the two acts of negligence to enable it to be said that the *Radstock* was alone to blame, and that the action of the *Volute* might be ruled out of consideration. Both vessels had contributed to the damage.

It should here be added that Lord Finlay, in delivering judgment next after the Lord Chancellor, used the following words: "I regard the judgment to which we have just listened as a great and permanent contribution to our law on the subject of contributory negligence, and to the science of jurisprudence."

A. D. S.

TRADE UNION—EXPULSION—JURISDICTION OF COURT—TRADE UNION ACT,
1871 (34 & 35 VICT. C. 31), s. 4.

Amalgamated Society of Carpenters, &c. v. Braithwaite. General Union of Operative Carpenters v. Ashley. [1922] 2 A. C. 425.

THE plaintiffs, the present respondents, were members of the two defendant trade unions. They participated in a co-partnership trust instituted by their employers.

A rule of the first union provided for the expulsion of members who worked on any co-partnership system of which that union disapproved, Rule 32 of the second union made like provision when members worked "on the premium bonus system." The plaintiffs brought actions for injunctions to restrain the unions from expelling them under the above rules.

Held, affirming a decision of the Court of Appeal, that section 4 of the Act of 1871 did not take away the Court's jurisdiction to grant the injunctions claimed, and, as the plaintiffs had committed no breach of the rules, they were entitled to an injunction.

Two points arose for consideration, the first depending upon the interpretation of the Act of 1871, the second upon the construction of the rules noted above.

We are concerned only with the first of these problems.

The preliminary question was whether the granting of the injunction claimed was the direct enforcement of an agreement of the kind contemplated by the relevant section of the Act of 1871, and hence beyond the power of the Courts.

The answer was that to grant an injunction maintaining parties in their present position in which they had certain unenforceable rights, was not enforcing those rights.

Section 4, as far as it is material, runs:—"Nothing in this Act shall enable any Court to entertain any legal proceedings instituted with the object of directly enforcing . . . (1) Any agreement between members of a trade union as such concerning conditions on which members . . . shall or shall not . . . be employed. . . . (3) Any agreement for the application of the funds of a trade union (a) to provide benefits for members."

The appellants contended that the proceedings offended the section for two reasons, (1) because the object was the direct enforcement of an agreement concerning conditions of employment, and (2) because the direct enforcement of benefits to members was involved.

The House of Lords were emphatically of the opinion that the proceedings did neither the one thing nor the other; and the matter would have been quickly disposed of except that it was necessary to give a decent burial to one or two conflicting decisions, and to explain that the decision of Sir George Jessel, in *Rigby v. Connol*, 14 Ch. D. 482, was too wide. Indeed, it is hardly open to argument, since *Wolfe v. Mathews* (1882) 21 Ch. D. 194 (followed in later cases), that an injunction does not amount, necessarily, to direct enforcement.

In the present case Lord Buckmaster said:—"I should have thought it plain that an action which in fact asks for nothing but a declaration as to the construction of a rule of membership, and, as incident thereto, an injunction, was not an attempt to enforce directly any such agreement as referred to by the statute." And, again, further on:—"It appears to me a totally different proposition to say that a man claims to possess rights and that he seeks to enforce the obligations they create."

Lord Atkinson said:—"Yet it is contended that a legal proceeding instituted by a person which secures to that person continuance in a position in which he is disabled from enforcing a particular contract is a proceeding enforcing that contract. That appears to me to be . . . a most illogical conclusion."

We may compare the remarks of Buckley, L.J., in the second *Osborne Case* [1911] 2 Ch., at p. 567: "An order to restore to membership with unenforceable rights is no order to restore those rights." There an expelled member was held entitled to maintain an action asking for a declaration that the rule under which he was expelled was *ultra vires*, and he obtained the necessary ancillary injunction.

Dun v. Bevan [1921] 38 T. L. R. 172, is another example of where the relief asked for was held not to amount to a direct enforcement. There

Sargant, J., said that in declaring ballots invalid he would not be directly enforcing an agreement for the payment of subscriptions. Cf. Lord Sterndale, M.R., in *McLuskey v. Cole* [1922] 1 Ch. 17; also *Cope v. Crossingham* [1909] 2 Ch. 148.

In referring to *Wolfe v. Mathews* (*supra*), Lord Buckmaster said it "depends upon considering whether relief by way of an injunction is a method of directly enforcing an agreement, and that question does not admit of a complete and comprehensive reply. It depends upon circumstances." This gives us the key to the situation when taken in conjunction with Lord Halsbury's comment on *Rigby v. Connol* (*supra*), in the judgment in *Yorkshire Miners' Association v. Howden* [1905] A. C., at p. 261: "I am bound, however, to say if that decision ever came up for review, I think it would have to be considered whether it does not strike the word 'directly' out of the statute."

The conclusion, then, is this: The legislators inserted the word 'directly,' and that is the important word, the pivot. To bring section 4 into operation and to oust the jurisdiction of the Courts, there must be (1) an agreement of the kind mentioned in that section; (2) proceedings instituted with the object of directly enforcing that agreement.

When an injunction or declaration is asked for which maintains or restores the *status quo*, the Courts will entertain the proceeding even though, if the relief is granted, it will amount to an indirect enforcement of that agreement. The cases given above show what the Courts do not regard as a direct enforcement.

The general tendency indicated is that trade unions are considered too powerful to be left outside and above the law, and that therefore the Courts, when appealed to, must not shrink from investigating even domestic disputes between the union and its members, except when they are definitely precluded from interfering by the "directly enforcing" prohibition of the Act of 1871.

A. E. R.

STATUTORY DUTIES—INDEPENDENT CONTRACTOR.

Phillips v. Britannia Hygienic Laundry Co., Lim. Weekly Notes, Feb. 10, 1923.

THE defendants sent their motor-lorry to be repaired by a firm of high competence and repute. Two days after the return of the lorry an axle broke, and a wheel came off and damaged the plaintiff's van.

It was held by the County Court Judge that the defendants were not negligent, but that the repairers were negligent in not providing a new axle. Judgment was given for the plaintiff, on the ground that he had suffered damage from the defendants' breach of Article II., Regulation 6 of Motor Orders (Use and Construction) Order of 1904.

The defendants appealed and the appeal was allowed.

The above order provides that "the motor-car and all the fittings thereof shall be in such a condition as not to cause damage to any person on the motor-car or on any highway."

The breach of the regulation, apart from any proof of negligence or knowledge on the part of the defendants, was held not actionable, the regulation not being enacted for the benefit of any particular class of persons,

but being merely directed to public and police purposes. The possibility of a private right of action for the breach of a public statutory duty must depend on the scope and language of the statute taken as a whole.

There was no breach of an absolute duty, and negligence or misconduct on the part of the defendants should have been shown. It is only in certain special cases that there is an absolute duty on an owner which renders him liable for the negligence of an independent contractor.

In *Tarry v. Ashton* (1876) 1 Q. B. D. 314, the occupier of a house with a lamp projecting over the street was held liable for damage done by its fall, though he had employed a competent person to put it in repair, but there is a special duty imposed on the owner of property abutting on a highway.

The decision in *Phillips v. Britannia Hygienic Laundry Co.* shows that unless an absolute liability can be shown there is no ground for action without negligence or misconduct on the part of the defendant, and that such absolute liability is the exception, not the general rule.

G. G. P.

HIGHWAYS AND LOCOMOTIVES ACT, 1878—"EXTRAORDINARY" TRAFFIC ON A HIGHWAY—LOCOMOTIVES ACT, 1898.

Henry Butt & Co. v. Weston-super-Mare Urban District Council.
[1922] 1 A. C. 340.

"WHERE by a certificate of their surveyor it appears to the authority which is liable or has undertaken to repair any highway, whether a main road or not, that having regard to the average expense of repairing highways in the neighbourhood, extraordinary expenses have been incurred, by such authority in repairing such a highway, by reason of the damage caused by excessive weight passing along the same, or extraordinary traffic thereon, such authority may recover in a summary manner from any person by whose order such weight or traffic has been conducted the amount of such expenses as may be proved to the satisfaction of the court having cognizance of the case, to have been incurred by such authority by reason of the damage arising from such weight or traffic as aforesaid" (41 & 42 Vict. c. 77, s. 23).

This was a claim by the council for the sum of £1,750 alleged to be money spent in the repair of highways which, it was submitted, had been damaged by the traffic for which the defendants were responsible. The defendants were owners of stone quarries in the neighbourhood, and the claim stated that two heavy steam wagons employed by them in the course of their business were "extraordinary traffic," and that the defendants were liable for the cost involved in repairing such damage.

The following points are deduced from decided cases:—

- (1) Public highways must be kept in a fit state to accommodate the ordinary traffic which passes or may reasonably be expected to pass along them. Such ordinary traffic may vary in nature from year to year. Where the increase in traffic is due to the natural development of the district, such traffic must be considered ordinary: *Billericay Urban District Council v. Poplar Union and Keeling* [1911] 1 K. B. 734.
- (2) What is and what is not extraordinary traffic varies from time to

- time. It is a question of fact, which must be determined in each individual case according to the existing circumstances. A mere increase in one particular type of traffic does not make such traffic extraordinary: *Barnsley Co-operative Society v. Worsborough Urban Council* [1916] A. C. at p. 300.
- (3) The function of the road in question and of other similar roads in the district, together with the normal annual cost of repairing such roads, must be considered: *Billericay Urban District Council v. Poplar Union and Keeling*, *supra*.
 - (4) Mere user of a road by one person more than others, no matter to what extent, is not extraordinary traffic, even though such user by its frequency cause damage: *Hill v. Thomas* [1893] A. C. 333.
 - (5) Extraordinary traffic is the carriage of articles over a road which is so exceptional in the quality or quantity of articles carried as substantially to alter and increase the burden imposed by the ordinary traffic of the road and thereby cause damage beyond what is common: *Hill v. Thomas*, *supra*.
 - (6) The use of a heavier vehicle for transport, even though the amount of actual carting done is in no way increased, may nevertheless constitute extraordinary traffic: *Henry Butt & Co. v. Weston-super-Mare Urban District Council*, *supra*.

The plaintiffs were held liable in damages. The following extract from Viscount Finlay's judgment sums up the law: "The question ultimately resolves itself into this—Has the weight charged as excessive become part of the ordinary and general user of the particular road in question? If anyone wishes to use a country road for the passage of heavy motor lorries which it has never borne and is not fit to bear, he is liable to contribute to the cost of repairs under this section, and a mere continuance of such user by the person who began it cannot by itself make it a part of the ordinary user of the road": *Henry Butt & Co. v. Weston-super-Mare Urban District Council*, *supra* at p. 359.

The council only obtained judgment for £250, the amount of expenses incurred for the damage done during the twelve months immediately preceding the bringing of the action. This was in accordance with the following section of the Locomotives Act, 1898 (61 & 62 Vict. c. 29, s. 12): "Proceedings for the recovery of any expenses incurred after the passing of this Act shall be commenced within twelve months after the time at which the damage has been done."

H. M. A.

NEGLIGENCE—DANGEROUS PREMISES—DEFECTIVE COMMON STAIRCASE OF FLATS—INJURY TO LODGER OF TENANT—LIABILITY OF LANDLORD.

Fairman v. Perpetual Investment Building Society. [1923] 1 A. C. 74.

THE elaborate judgments in this case have cleared up one obscurity in the law relating to dangerous premises, and the case of *Miller v. Hancock* [1893] 2 Q. B. 177, for almost twenty years a leading case upon this subject, will trouble the law student no more. If not definitely overruled, it at least sinks merely to the position of an unsatisfactory example of the rule in *Indermaur v. Dames*, L. R. 1 C. P. 274.

In the present case the respondents owned a block of flats with a common staircase, the flats being let out to tenants. The appellant, a lodger of one of the tenants, tripped on a step in which a cavity had been worn, fell and was severely injured. The trial Judge found that the stairs were not dangerous and that their condition was patent, and upon these findings gave judgment for the owners. Before the House of Lords the appellant contended that she was entitled to a verdict upon these findings, on the ground that *Miller v. Hancock* (*supra*) cast a general duty upon the landlord in these circumstances to keep the premises in repair.

Their Lordships, while differing upon the inference to be drawn from the actual facts of the case, and upon the question whether the appellant was an "invitee" or mere licensee, decisively rejected this plea. At most the appellant was an invitee, and, in the absence of negligence on the part of the landlord, could not recover. *Miller v. Hancock* (*supra*), in so far as it "decides that an owner of property is liable contractually to others than parties or privies, or non-contractually is under a duty to repair, even though the want of repair is patent, is inconsistent with the authorities cited" (*per* Lord Sumner at p. 94). The liability in tort in this class of case as well as others is correctly expressed by Willes, J., in *Indermaur v. Dames* (L. R. 1 C. P. at p. 288), which is set out and expressly approved by Lord Atkinson (at p. 86). It is as follows: "With respect to such a visitor at least we consider it settled law that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know." Colloquially stated, this is in effect to make the landlord responsible to an invitee only for a "hidden trap."

There can be no doubt that the result of this decision is to enable a branch of the law of tort which does not err upon the side of clarity to be more certainly stated. This is a great gain even when made at the expense of an old friend.

E. B.

DUTY OF CARE TO INVITEE—TACIT INVITATION—CONTRIBUTORY NEGLIGENCE.

Mercer v. South Eastern and Chatham Railway Co.
[1922] 38 T. L. R. 431.

It was the custom of the defendant company's servants at a certain level-crossing to lock the foot-passengers' wicket-gate when a train was about to pass along. This practice was known to the plaintiff, who, finding the wicket-gate unlocked one night, proceeded to cross the line, and was injured by an approaching up-train. The plaintiff did not hear the up-train approaching owing to the noise of a down-train which had just passed, and he could not easily see its approach owing to the darkness. He thereupon brought an action and recovered damages for his injuries from the railway company.

The defence was (1) that there was no tacit invitation to cross, or, alternatively, (2) that the accident was occasioned by the contributory negligence of the plaintiff in not taking reasonable care.

Since the plaintiff knew of the company's undisputed practice to lock the wicket-gate when a train was approaching, the fact that he found the gate

unlocked constituted a tacit invitation to him by the railway company to pass over the line.

This case, therefore, is governed by the principle of *Indermaur v. Dames*, L. R. 1 C. P. 274, as affirmed by the Exchequer Chamber, L. R. 2 C. P. 311. Thus, any person entering on premises at the invitation, express or implied, of the occupier is entitled to expect such occupier to use reasonable care to warn or otherwise to protect him from unusual dangers of which that occupier is or should be aware. Nevertheless, the visitor himself must use reasonable care for his own safety, or the occupier's liability will cease.

In *Indermaur v. Dames* the plaintiff, in his capacity as the servant of a gasfitter, was testing certain gas-fittings for the defendant on an upper floor in the latter's factory. Whilst so engaged the plaintiff accidentally, and without negligence on his part, fell through an unfenced shaft and was seriously injured. The Court held that the gasfitter was a tacit invitee of the defendant, and that his injuries had been caused by the defendant's negligence in not using sufficient means to warn or protect him from such an unusual danger.

As regards the alternative defence of contributory negligence, the circumstances of the present case show that the darkness and the noise of the receding down-train made it difficult to detect the approach of the up-train, and this, together with the fact that the tacit invitation to cross the line threw the plaintiff off his guard, was sufficient to negative the plea of contributory negligence set up by the defence.

If it had been daylight, or had the company been accustomed to leave the gate unlocked at all times, the defence of contributory negligence would have had more weight, but even in such circumstances it seems probable that it would not have been considered strong enough to justify the withdrawal of the case from the jury. Moreover, Lush, J., in an *obiter dictum*, said that even though in the present case the plaintiff had been waiting for the down-train to go by, and the gate had been unlocked the whole while, there still would have been a tacit invitation for the plaintiff to cross the line as soon as the train had passed.

S. J. B.

DUTY OF LICENSOR TO PROTECT LICENSEE FROM KNOWN CONCEALED DANGERS —JUVENILE LICENSEES.

Glasgow Corporation v. Taylor. [1922] 1 A. C. 44.

THE respondent's seven-year-old son had died as a result of eating poisonous berries from a shrub growing in a public part of certain botanic gardens under the control of the appellant corporation. There was no notice warning the public of the dangerous nature of the shrub in question.

The Lord Ordinary had held that there was no cause of action against the Glasgow Corporation, but this decision was overruled by the Second Division of the Court of Session, and the corporation thereupon appealed to the House of Lords.

The appellants relied on the principle of *Hastie v. Edinburgh Magistrates* [1907] S. C. 1102, and *Stevenson v. Glasgow Corporation* [1908] S. C. 1034, &c. They contended that they were under no more duty to fence off poisonous shrubs than sheets of water, and that the one is no more

attractive and dangerous to children than the other. Further, they urged that they were bound to give notice only of hidden dangers, and that the duty of protecting children from risks obvious to persons of average intelligence lies on the parents or guardians of such children.

The appeal was dismissed with costs.

This case falls within the principle of *Cooke v. Midland Great Western Railway Co. of Ireland*, L. R. [1909] A. C. 229, where a child playing with a turntable on defendants' land was held to be a licensee because the company's servants well knew that children habitually went there and played with the turntable. The company was therefore held liable by the House of Lords for negligence to the child in question, who had been injured by the turntable, because the instrument was dangerous and attractive to children of such tender years.

Another case in point is *Lynch v. Nurdin* (1841) 1 Q. B. 29, wherein defendant's servant left a horse and cart unattended on a highway for upwards of half-an-hour, and the plaintiff, a seven-year-old boy, got into the cart while his playmate urged the horse on, so that he fell out, and his leg was broken by the wheel. Although the plaintiff in this latter case was a trespasser, yet, owing to his youth and the gross negligence of defendant's servant, which tempted him to commit the trespass, the defendant was held liable.

The principle of *Latham v. Johnson* [1913] L. R. 1 K. B. 398, does not apply to the present case, for there a two-year-old child, who held an implied licence to play on defendant's land, was injured while playing there on a heap of paving-stones, her finger being crushed between the stones. Here the defendant was held not liable, as there was no allurement or trap, a stone heap not being a concealed or unusual danger.

The Scottish cases, *Hastie v. Edinburgh Magistrates* and *Stevenson v. Glasgow Corporation* (*supra*), are distinguishable from the present case, since they dealt with dangers due to unfenced lakes and rivers, which are natural and obvious dangers, not concealed traps, and which therefore do not require isolation or warning.

In the present case it was not contested but that the appellant corporation was well aware of the poisonous nature and attractive appearance of the berries of the plant concerned. It was admitted, too, that the child was not a trespasser, for the plot of land where the plant grew—though fenced with low rustic work and an insecurely fastened gate—was open to the public. Thus, the appellants were guilty of negligence in not giving notice or warning or some adequate protection to shield children from injury.

As regards the protection and warning necessary in these circumstances, Lord Shaw of Dunfermline stated that "dangers which are not seen and obvious should be made the subject either of effectively restricted access or of such express and actual warning or prohibition as reaches the mind of the person prohibited." Thus it appears that with regard to young children the controllers of public places have no practical alternative but to restrict all access to dangerous things in order to escape liability.

Hence it appears that the possessor of goods or land must take reasonable care for the safety of any licensee endangered by them, by warning or protecting him from concealed dangers which, under the circumstances, are likely to entrap him, and are known to that possessor.

If, however, the premises are reasonably safe in themselves (*Latham v. Johnson*, *supra*), or the danger is natural and obvious (as in *Hastie's*

Case, supra, and *Stevenson's Case, supra*), the occupier is not liable to licensees for damage resulting therefrom.

What the criterion of obviousness is does not appear as yet to have been decided. In fact, as regards child licensees, who are of course more likely to be ignorant of dangers than adults, it does not seem settled whether the danger must be obvious to the child itself or to its parents or guardians in order to obviate liability; nor does it seem clear whether a written notice of warning would be considered a good defence, for, though intelligible to parents and guardians, it might be meaningless to young children.

S. J. B.

FACTORS ACT, 1889—POSSESSION AND LARCENY BY A TRICK—TITLE OF PURCHASER.

Folkes v. King. [1923] 1 K. B. 282.

THE plaintiff arranged with one Hudson, who sold cars on commission, that he (Hudson) should sell the plaintiff's car, at not less than £575 without special permission. Hudson took the car with the intention of defrauding the plaintiff, and, having sold it, kept the proceeds. The car finally came to the hands of the defendant, who, like the other parties through whose hands the car had passed, acted in good faith.

In an action for the return of the car or its value, and damages for detainee, judgment was given for the plaintiff; but the Court of Appeal reversed this decision of the lower Court and held that the case was covered by the Factors Act, 1889, s. 2, sub-s. 1—*i.e.*, that Hudson was in possession of the car with the consent of the owner and so was able to give a good title.

Section 2, sub-section 1 of the Factors Act reads as follows: "Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods, made by him while acting in the ordinary course of business of a mercantile agent shall, subject to the provisions of this Act, be as valid as if he were expressly authorised by the owner of the goods to make the same: provided that the person taking under the disposition acts in good faith and has not at the time of the disposition notice that the person making the disposition has not authority to make the same."

The case of *Folkes*, the original plaintiff, was, very briefly, that Hudson had been guilty of larceny by a trick: therefore he could not be said to have been in possession of the car with the consent of the owner, and section 2, sub-section 1 of the Factors Act did not apply. (It should be noted that it is not denied that if Hudson had been guilty of obtaining goods by false pretences or of "larceny by a bailee" he could have passed a good title under the section).

The Court of Appeal may be said to have come to two definite conclusions:—

(1) Hudson was not guilty of larceny by a trick.

(2) Even if he had been, the distinctions of the criminal law should not be used for interpreting such a statute as the Factors Act.

As regards (1), various *dicta* as to the nature of larceny by a trick were quoted: that of Buckley, L.J., in *Whitehorn Bros. v. Davison* [1911] 1 K. B. 463 may serve as an example: "I think there is larceny by a

trick where the owner of goods induced thereto by a trick voluntarily parts with the possession of the goods, *but does not intend to pass the property in them*, and the recipient has the *animus furandi*. . . . On the other hand, goods are obtained by false pretences when the owner of the goods being induced thereto by a trick voluntarily parts with the possession of the goods and does intend to pass the property. . . . Suppose the facts are that the owner of the goods, being induced thereto by a trick, intends not to pass the property in them, but to confer on the person to whom he gives possession a power to pass the property; . . . it seems to me . . . that it is obtaining goods by false pretences." The views expressed in this *dictum*, including the last part of it, which seems directly to apply to the present case, were in effect approved of by the whole Court.

As regards the second point, the Court was unwilling to limit the operation of the Factors Act by what they regarded as the artificial distinctions of the criminal law.

It is possible that this decision will not meet with universal approval. The Factors Act is, of course, a limited application of the maxim to be found in French law: "*en fait de meubles la possession vaut titre*," a principle also applied to a limited extent in the rule of market overt. But this principle is not the rule, but the exception, in English law: the effect of "market overt" is nullified by the conviction of the thief. To some it may seem probable that section 2, sub-section 1 of the Factors Act also ought not to be allowed so wide an application as might at first sight appear. Are we to construe the word "consent" in its popular meaning, or is it possible that legally the word may have a somewhat different signification, in accordance with the maxim that "Fraud vitiates consent"? In *Oppenheimer v. Frazer and Wyatt* [1907] 1 K. B. 50 the plaintiff parted with certain diamonds to Schwabacher, a diamond broker, who represented that he knew some likely customers. Schwabacher handed them to Broadhurst, a confederate, who asked Frazer and Wyatt to purchase them from Schwabacher on joint account with himself. Frazer and Wyatt were held to be partners with Broadhurst in this transaction; and, since Broadhurst did not act in good faith, the Court of Appeal held that this prevented Frazer and Wyatt also from claiming protection under the Factors Act.

That was all that was strictly necessary to decide the case. But the jury in the lower Court had found that Schwabacher had been guilty of larceny by a trick: and the members of the Court of Appeal went on to state what was in their opinion the effect of the section in such a case. Sir Gorell Barnes said: "I confess to feeling very great doubt whether, in the face of that finding [that Schwabacher had been guilty of larceny by a trick] Schwabacher can be considered to have been in possession of the goods with the plaintiff's consent." In the same case Fletcher Moulton, L.J., said: "In *Cahn v. Pockett's Bristol Channel Steam Packet Co.* [1899] 1 Q. B. 643 this Court had to consider the meaning of this provision [the above section], and its decision may be summed up, as it appears to me, in a single phrase, namely, that consent for the purposes of the section must be what amounts to consent in the eye of the law." He then goes on to quote with approval words of Collins, L.J., in *Cahn's Case*: "However fraudulent the person in actual custody may have been in obtaining possession, *provided it did not amount to larceny by a trick* . . . he can by his disposition give a good title to the purchaser." Later he says: "A mercantile agent is as capable of stealing as any other man, and, if he has

stolen the goods, there can be no question, in my opinion, that he must be taken to hold possession of them without the consent of the owner. One of the recognised methods of stealing at common law is distinguished from other types of larceny and called larceny by a trick, but it is in the eye of the law pure stealing." It is certainly difficult in the present case to hold that legally Hudson was in possession of the car with the consent of the owner: Folkes certainly did not intend to pass the property (or a power to pass the property) to a thief: and in such a case as this possession is only passed in order to effect this ulterior purpose.

If, then, one ventures still to adhere to the opinion that the section does not apply to cases of larceny by a trick, the question then remains: Is there any reason for doubting the decision of the Court of Appeal on the other point, and for holding that Hudson in the present case was guilty of larceny by a trick? In *Cahn's Case* Fletcher Moulton, L.J., said: "The crucial point for the purpose of establishing larceny by a trick, as distinguished from larceny by a bailee, seems to me to be that there should have been an intention at the moment of obtaining possession then and there to steal"; and he thought that Schwabacher in that case was guilty of larceny by a trick, as he had the *animus furandi* when he obtained possession. In the present case it is not denied that Hudson had the *animus furandi* when he obtained custody of the car, and it does not seem possible to distinguish the two cases on this point. Again, in *Reg. v. Russett* [1892] 2 Q. B. 312, Lord Coleridge, C.J., said: "If the possession of the money or goods stolen has been parted with, but the owner did not intend to part with the property in them, so that part of the transaction is incomplete and the parting with the possession has been obtained by fraud—that is larceny." Pollock, B., and Hawkins, A. L. Smith, and Wills, J.J., agreed. This agrees with the first part of Buckley, L.J.'s *dictum* (above) in *Whitehorn Bros v. Davison*, and, it is submitted (in spite of the last part of that *dictum*), covers a case like the present. Apart from the question of possession, Folkes surely cannot be said to intend to pass the property. At the most he is only willing to pass the property if a purchaser can be found—and then not any purchaser, but only one who will come up to the stated price of £575. Suppose no purchaser could have been found: did it then have been said that Folkes had intended to pass the property?

An important case where the principle was applied is *R. v. Buckmaster*, 20 Q. B. D. 182, where the prosecutor deposited money with Buckmaster, a bookmaker: the horse he backed won, but Buckmaster decamped with the money. The prosecutor parted with his money with the intention that in the event of the horse winning it should be repaid: while the prisoner obtained possession of the money fraudulently, never intending to pay it back in any event. In these circumstances there was held to be no contract by which the money could pass, and therefore there was evidence of larceny by a trick. In that case the prosecutor intended that the property should pass if the horse he backed failed, just as Folkes in the present case intended that the property in the car should pass if a purchaser at the right price could be found. Other cases that should be seen are *R. v. Brown* (1856) 1 Dearsley & Pearce, 616, and *R. v. Jansen* (1849) 4 Cox, 82.

These arguments are put forward with the greatest hesitation, but it is submitted that they ought to receive due consideration before one unhesitatingly subscribes to the opinion of the Court of Appeal.

S. E. W. B.

TORT—MASTER AND SERVANT—LIABILITY OF MASTER FOR ACTS OF SERVANT
—SCOPE OF SERVANT'S AUTHORITY—FALSE IMPRISONMENT.

Percy v. Glasgow Corporation. (1922) 38 T. L. R. 722.

THE appellant brought this action for damages for false imprisonment—wrongous detention, as it is called in Scotland. He stated that while travelling on one of the tramway-cars belonging to the respondents, he had tendered in payment of his fare one penny; the coin was slightly marked or indented, but was nevertheless a sufficient and legal tender in payment of his fare. The conductor of the tramway-car and, later, an inspector, both servants of the respondents, had refused to accept this penny, and eventually had summoned a police constable and given the appellant into custody (which lasted a short period) on a charge of refusing to pay his fare, and this notwithstanding that the appellant had stated his name and address. The appellant averred further that the conductor and inspector were acting within the scope of their employment, as they were empowered so to act under the by-laws made by the corporation, authorized by the Glasgow Corporation Tramway Acts, 1870—1893; one of these, dealing with the case of anyone who evaded or attempted to evade payment of his fare, ran as follows: "And it shall be lawful for any officer or servant of the Corporation and all persons called by him to his assistance to seize and detain any such passenger whose name or residence is unknown to such officer or servant, until such passenger can be taken before a magistrate or until he be otherwise discharged in due course of law."

Upon these averments the Lord Ordinary allowed the case to proceed to trial, but his interlocutor was recalled by the First Division on the ground that the appellant had fled himself out of Court by his admission that he had told the conductor and inspector his name and address, for thereby their action was removed from the protection of the by-law quoted.

The House of Lords unanimously held that the interlocutor of the Lord Ordinary should be restored and the case proceed to trial. For whether the respondents' servants were (on the mere word of the appellant, which they were not bound to believe) to be taken to have known his name and address or not, yet in any case those servants were acting, however mistakenly, within the scope of their authority. Observations of *Story on Agency*, §§ 452, 456, which had been adopted by Blackburn, J., in an earlier case and approved in *Lloyd v. Grace, Smith & Co.* [1912] A. C. 716, were again approved by the House of Lords.

This case throws further light upon the difficult question of the extent of a master's liability for the torts of his servants. There seem to be two principles on which such liability rests—(1) that the master is liable for any tort committed by the servant for the master's benefit (*Barwick v. English Joint Stock Bank* (1867) L. R. 2 Ex. 259), or for any tort which is one of a class of acts which the servant is employed to do for the benefit of his master (here *Seymour v. Greenwood*, 7 H. & N. 355 is very much in point with regard to the principal case), and this even though such act has been expressly forbidden by the master (*Limpus v. London General Omnibus Co.* (1862) 1 H. & C. 526); or (2) that the master is liable because the servant was held out to be his agent upon whom third parties could rely (*Lloyd v. Grace, Smith & Co.* [1912] A. C. 716).

These two principles of liability are absolutely distinct. As was said in *Joseph Rand v. Craig* [1918] 1 Ch. 1: "There is a natural distinction

between a case where a man directs another to do a particular act and a case where a man in business appoints an agent for the purpose of carrying on the business and holds out that person as the person to whom the public are to apply if they do business with him." And it is to the first of these two principles that *Percy v. Glasgow Corporation* applies. It is another illustration of where the line runs which separates acts done by the servant within the scope of the servant's authority from those done by the servant (as in *Mintz v. Silverton* (1920) T. L. R. 399) solely for the servant's own benefit.

R. J. F. B.

CONTRACT—SECTION 4 OF SALE OF GOODS ACT—VARIATION AND RESCISSION
BY PAROL AGREEMENT—WAIVER OF CONDITIONS PRECEDENT.

*British and Benington's, Lim. v. North Western Cachar Tea Co., Lim.
and Others.* [1923] A. C. 48.

In this case two points of law arose for argument before the House of Lords, the first as to the effect of a subsequent parol arrangement upon a contract for the sale of goods evidenced by writing in accordance with the provisions of section 4 of the Sale of Goods Act, and the second as to the right of a contracting party, who has repudiated the contract upon the ground of an alleged breach by the other party, to justify that repudiation upon the ground of other breaches by that other party—or, in other words, as to the effect of the important case of *Braithwaite v. Foreign Hardwood Co.* [1905] 2 K. B. 543. The main importance of the case in the House of Lords lies in Lord Sumner's criticism of *Braithwaite's Case*.

The facts in *British and Benington's, Lim. v. North Western Cachar Tea Co.* were as follows: By contracts in writing the appellants agreed to buy from the respondents, who were Indian tea growers, their 1919-1920 crops of tea, delivery to be in London. The contracts specified no time for delivery, and they contained an arbitration clause. Early in 1920, owing to congestion at the London Docks, ships carrying certain consignments under the contracts were diverted by order of the Shipping Controller to several out-ports in England and Scotland. In May, 1920, the parties by a parol arrangement agreed that the appellants should accept delivery of the diverted consignments at the out-ports instead of in London, receiving a certain allowance per pound. There was further congestion and consequent delay at the out-ports, and in July, 1920, when no portion of the diverted consignments had been delivered either in London or at the out-ports, the appellants repudiated their liability under the contracts on the ground that a reasonable time for delivery had expired, and the respondents did not seek to hold the appellants to their contracts, but asked for an arbitrator. The arbitrator found that a reasonable time for delivery under the contracts had not expired, and awarded damages to the respondents.

1. Upon the first point, as to the effect of the parol arrangement, the Court merely applied *Morris v. Baron & Co.* [1918] A. C. 1, and held on the facts that the effect of the parol agreement was at most to vary the original contracts.

The law on this point seems to be—

(a) A mere oral concession for the convenience of one party is not part and parcel of a contract for the sale of goods, and therefore has no effect on the written contract: *Levey v. Goldberg* [1922] 1 K. B. 688.

(b) A subsequent parol agreement may rescind the prior written contract either expressly or if the agreement is entirely inconsistent with it, or inconsistent to an extent that goes to the root of it (*per* Lord Atkinson [1923] A. C. at p. 62).

(c) "The discharge of the old contract depends on intention" (*per* Lord Sumner at p. 69). In the absence of such intention the effect of the parol agreement is merely to vary the old contract. In order that the plaintiff shall not be prevented from suing on the old contract, the effect of section 4 of the Sale of Goods Act is "that the original formal contract is not in any question of evidence in proceedings to be treated as varied by a subsequent contract which is informal and therefore of imperfect obligation" (*per* Lord Haldane, *Morris v. Baron & Co.* [1918] A. C. at p. 18). The parol variation has therefore no effect on the original contract.

2. The appellants, therefore, were in the position of having to justify their repudiation of the original contract. The House disagreed on the question whether the respondents were at the time of the appellants' repudiation ready and willing to perform the original contracts, and it seems that section 4 of the Act may work great injustice if a party who intends to perform a contract as varied by parol agreement is to be precluded from recovering upon the old contract, because the section prevents the Court from regarding the variation.

As to the question whether the appellants, having repudiated the contracts on the ground that a reasonable time for delivery had elapsed, were entitled to support that repudiation upon the ground that the respondents were not ready and willing to perform the contracts sued upon and deliver in London, Lord Atkinson was of opinion that the effect of *Braithwaite v. Foreign Hardwood Co.* [1905] 2 K. B. 543, was that the appellants had waived that ground of repudiation and could not now rely upon it. Lord Sumner (with whom Lords Buckmaster, Wrenbury and Carson appear to have agreed) held that *Braithwaite's Case* had not so decided, and that if it had it was bad law.

In *Braithwaite's Case*, the defendants had bought rosewood from the plaintiff, to be delivered at Hull in instalments, cash payable against bill of lading. While the first instalment was on the sea the defendants wrote repudiating the contract, on the ground that the seller had broken a collateral agreement not to supply rosewood to any other person. When the bill of lading was presented to the defendants they repeated their repudiation, and refused to accept the first or the later consignment. Subsequently the defendants learned that the first consignment was not in accordance with contract. At the trial it was held that there had been no such oral agreement, and that the defendants, by insisting upon their repudiation, which was unjustified, had waived the performance by the plaintiff of all conditions precedent to be satisfied by him, and judgment was given for the plaintiff, but the defendants were allowed to give evidence of the inferiority of the first consignment in reduction of damages.

In the Court of Appeal, in *Benington's Case*, Scrutton, L.J. (who was counsel in *Braithwaite's Case*), apparently considered that case to decide that a party to a contract who repudiates upon a specified ground is not entitled to justify that repudiation on the ground of other breaches by the other party. In the House of Lords, Lord Sumner (who was counsel on the other side), gives a perplexing explanation of the case. The effect of this is apparently that the decision is to be confined to the facts of *Braithwaite's Case*, and that there was an explicit waiver by the

defendants, who, when the plaintiff had kept the contract alive and proposed to tender the cargo, in effect had said a second time in terms of the first refusal, "You need not tender any cargo to us at all; *a fortiori* you need not tender a cargo in conformity with the contract. You have a cargo of some sort which we refuse to take; and you may prove your damages for that if we fail to prove you wrong." Lord Sumner goes on to say: "If the buyer had repudiated, giving no reason at all, I suppose all reasons and all defences in the action would be open to him. His motives certainly are immaterial, and I do not see why his reasons should be crucial."

With this latter statement of the law, possessing as it does the great authority of Lord Sumner, no one can disagree. As to his view of the facts of *Braithwaite's Case*, it is submitted with deference that the report does not bear it out. The repudiation, as in *Benington's Case*, was upon a ground which bore no relation to the quality of the goods themselves. There is nothing in the report of *Braithwaite's Case* to show an express waiver, and it is clear from the judgment of Collins, M.R., at p. 552, that he considered that logically the reduction in damages should not have been made, but that the appellants, who were the defendants, could not complain of it.

The *ratio decidendi* of the case appears at p. 552, where Collins, M.R., says: "The defendants are not in a position now by reason of their after-acquired knowledge, to set up a defence which they previously elected not to make." Apparently, therefore, *Braithwaite's Case* is bad law, and the true view of the law is that a party repudiating a contract may waive the performance by the other party of conditions performable in the future, but is not prevented from relying on breaches by the other party already committed at the time of his repudiation, and that an example of such breach on which he may rely is the inability of the other party to perform the contract. This, it is submitted, is clearly good law and good common sense.

A. S. D.

SALE OF GOODS ACT—DELIVERY TO A THIEF—CONSTRUCTION OF CONTRACT.

Galbraith Grant, Lim. v. Block. [1922] 2 K. B. 157.

THE Sale of Goods Act, 1893, s. 24, lays down that it is the duty of a seller of goods to deliver them in accordance with the terms of his contract. In *Galbraith Grant, Lim., v. Block*, the Divisional Court enunciated a principle as to what constitutes delivery for the guidance of a County Court Judge. The plaintiffs sold certain wine to the defendant on the terms that it should be delivered at the defendant's premises. It was, therefore, the plaintiffs' duty to deliver, but nothing was said as to whether delivery was to be made to any particular person, for example, to Block himself. In fact, the plaintiffs handed the wine to a man who was on the defendant's premises, who looked like a storekeeper and who signed the delivery sheet in the defendant's name.

It turned out that this man was not the defendant's servant but a thief, who disappeared with the wine as soon as he got possession of it. The defendant pleaded that there had been no delivery, and the County Court Judge agreed with him, basing his decision on the view that, even though

goods are delivered at the place at which the vendor is directed to deliver them, yet, if an unauthorized person take them and appropriate them, there has been no delivery, however reasonably the vendor may have acted in handing over the goods.

The Divisional Court disagreed with this argument, and held that the contract to deliver at the defendant's premises meant exactly what it said and nothing more; it did not mean that delivery had to be made to any particular person. The plaintiffs delivered on the premises to someone who apparently had authority to receive; all that the plaintiffs were bound to do was to take reasonable care that no unauthorized person received the goods.

A. J. E.

PLEDGE—VALIDITY—DELIVERY OF GOODS TO BAILEE FOR PURPOSE OF CREATING FUTURE PLEDGE — SUBSEQUENT PLEDGE TO BAILEE — INTERMEDIATE PLEDGE BY BAILEE.

Blundell-Leigh v. Attenborough. [1921] 3 K. B. 235.

THE complicated facts of the case are as follows:—

On Nov. 1, the plaintiff gave her jewels to one Miller to value and to let her know what offer he could make as to lending her money. He was to keep the jewellery as security if he made the advance. Later, on the same day, Miller pledged the jewels with the defendant Attenborough.

On Nov. 3, Attenborough advanced to Miller £1,000, holding the jewels as security.

On Nov. 5, Miller advanced to the plaintiff the sum of £500 upon an agreement that plaintiff should give him a promissory note for £600, payable in six equal monthly instalments, and that he should be allowed to retain possession of the jewels as security for payment of the note.

On Dec. 8, Miller gave the plaintiff's promissory note and Attenborough's deposit note for the jewels to one Berners for value (an advance of £300). Berners gave plaintiff notice to pay her instalments to him.

On Dec. 16, Miller committed suicide.

The plaintiff paid Berners £400 on her promissory note, and although she had notice of the defendant's position, she claimed from him (*i.e.*, the defendant) the jewels without making him any tender.

In a lower Court, Salter, J., held that the handing of the jewellery by the plaintiff to Miller was a mere gratuitous bailment. "The pawning of the jewellery by Miller with the defendant was therefore in fraud of the plaintiff. . . . There never had been any valid pledge of the jewellery by the plaintiff to Miller (on Nov. 5), as the jewellery was not at the time of the contract of pledge in actual or constructive possession of either."

He, therefore, gave judgment for the plaintiff. The Court of Appeal reversed his decision.

The difficulty in this case arises out of the question whether the plaintiff's delivery of the jewels on Nov. 1 was sufficient to constitute a good delivery for the purpose of creating a pledge; *i.e.*, although the transaction between plaintiff and Miller was not completed until Nov. 5, did the relation of pledgor and pledgee arise between these two parties on the completion of the transaction on Nov. 5 or on the delivery of the jewels on Nov. 1?

On this point counsel for the defendant argued, "The pledge may be delivered as security either for a future or for a past debt." (*Fisher on Mortgages*, 6th ed., s. 196).

The debt here was a future debt.

Bankes, L.J. : There was on that day a bailment and delivery, and the conclusion of fact that I draw from what occurred is that the delivery, although it accompanied the bailment and was therefore a delivery for the purpose of the bailment, was also a delivery which as between these parties was to constitute a good delivery for the purpose of creating a pledge if Miller found that he could and did advance a sum which the plaintiff could accept.

Miller, therefore, can be considered as pledgee of the jewels from the time of delivery to him on Nov. 1. Therefore his intermediate pledge to defendant on the same day was perfectly valid. *Donald v. Suckling* (1866) L. R. 1 Q. B. 585, is in point. "A pledgee may dispose of his special interest in a pledge, although he may be sued by the pledgor if the latter is prevented from obtaining possession."

As the plaintiff in this case had made no tender to the defendant, she had no claim for the return of the jewels.

W. E. J.

IMPLIED CONDITION OF REASONABLE FITNESS OF GOODS BOUGHT FOR A PARTICULAR PURPOSE—SALE OF GOODS ACT, 1893, s. 14.

Manchester Liners, Lim. v. Rea, Lim. [1922] L. R. 2 A. C. 74.
23 T. L. R. 526.

THIS was an action brought by a firm of shipowners against the defendant coal company for supplying a certain steamship with coal so unsuitable for its furnaces that it was obliged to return to port. The defendants well knew the quality of coal which that particular steamship required. Salter, J., gave judgment for the plaintiffs, and the Court of Appeal reversed his decision, whereupon the plaintiffs appealed to the House of Lords.

Amongst other defences the respondents relied on an interpretation of section 14, sub-section 1 of the Sale of Goods Act, 1893, which suggested that even though a buyer "expressly or by implication makes known to the seller the particular purpose for which the goods are required," yet there can be no implied condition of fitness unless the buyer also shows the seller that he relies on that seller's skill and judgment.

The appeal was allowed, and the decision of the Court of Appeal reversed.

The Sale of Goods Act, 1893, in its preamble, professed merely to codify the then existing law on the subject; therefore it is to be read in the light of the pre-existing common law. In 1868 the case of *Jones v. Just*, L. R. 3 Q. B. 197, had reviewed the common law on the subject of implied warranties of quality and description, known since the Act as implied conditions. In this case the plaintiff had purchased a certain quantity of Manilla hemp shipped from Singapore, but when the hemp was delivered it was found to have been damaged by seawater, and in consequence, though still recognizable as hemp, it was not in a fit merchantable condition. The defendant vendor was unaware of this defect, and neither

he nor the purchaser had inspected the hemp before making the contract, as it had not then arrived in England. Nevertheless the seller was held liable on an implied warranty that the hemp was of saleable merchantable quality.

Thus, if goods are ordered for a special purpose, disclosed to the vendor, so that in accepting the contract he undertakes to supply goods suitable for the object required, this is itself sufficient to establish that the buyer has shown that he relies on the seller's skill and judgment.

Gillespie v. Cheney Eggar [1896] L. R. 2 Q. B. 59, was decided after the Act. Here the plaintiff had bought a cargo of coal under a written contract, and before the contract was made informed the seller that the coal was wanted for bunkering steamers. The Court decided that this previous disclosure of the object for which the coal was required was sufficient evidence to raise an implied condition under section 14 of the Act that the coal was reasonably fit for the purpose stipulated.

This latter case shows that the mere disclosure of a purpose may amount to sufficient evidence of reliance on the skill and judgment of the seller. Hence it is not necessary that the buyer shall stipulate in the contract that he relies on the seller's skill and judgment, nor even for him to say anything about it at all; for the circumstances of the case themselves may show sufficiently clearly that the purchaser depended on the vendor's knowledge and dexterity, to raise an implied condition that the goods are reasonably fit for the purpose for which they are required.

S. J. B.

LANDLORD AND TENANT—EVIDENCE OF AGREEMENT TO REPAIR—REQUIREMENT OF NOTICE OF WANT OF REPAIR.

Murphy and Others v. Hurley. [1922] 1 A. C. 369.

THIS case is of importance because it explains the principle upon which notice must be given by a lessee to a lessor requiring him to repair the demised premises in accordance with his covenant to repair. The requirement of such notice depends upon the facts of each case, and is not inherent in the relationship between landlord and tenant.

The plaintiffs were judicial tenants of adjoining holdings on the coast of County Kerry. During their tenancies the defendant built a sea-wall to protect the holdings from incursions of the sea. In 1916 the Chief Land Commissioner raised the plaintiffs' rents for a new statutory term, on the express understanding that the defendant should continue to maintain the sea-wall in repair. The wall was damaged by high tides in September, 1918, the holdings were flooded, and damage was done to the plaintiffs' pasture and crops. The defendant had received no notice that the sea-wall was in need of repair. Actions were brought to recover damages in respect of the loss caused by the floodings. The Court of first instance held that the plaintiffs could recover. The decision was upheld by the Divisional Court, but reversed by the Court of Appeal in Ireland. On Appeal, the House of Lords unanimously restored the order of the Court of first instance.

Makin v. Watkinson, L. R. 6 Ex. 25, was cited for the defendant. In that case the lessors of a mill covenanted to keep in repair the main walls, the main timbers and the roof of the mill. Damage resulted from

the failure to repair such essential parts of the building, and it was held that the absence of notice was a good defence to an action for breach of covenant to repair. The rule in *Makin v. Watkinson* was pressed to its furthest limits in *Hugall v. M'Lean*, 53 L. T. 94; 33 W. R. 588. The defendant let a house with a covenant to repair, amongst other things, the drains and sewers, and the plaintiff agreed to allow defendant or his agents to enter to do any act which might be required by the terms of the lease. As a result of the disrepair of the drains, the house was flooded with sewage. *Held*, that although the plaintiff had no means of knowing, and the defendant, though not actually knowing, had means of knowing, the state of the drains, the defendant was not liable in the absence of notice of want of repair.

In the case under consideration, *Hugall v. M'Lean* was explained on the ground that the covenant was an ordinary repairing covenant in an agreement for a lease of a dwelling-house, and hence the Court declined to depart from the established rule of construction, on the faith of which many leases were made. It was distinguished on the ground that it referred to a place of which the tenant was in sole occupation. It was established in *Tredway v. Machin*, 91 L. T. 310, that the duty of a tenant to give notice springs from the special knowledge of the need of repairs which his occupancy is presumed to give him, coupled with the state of ignorance of that need in which the absence of occupancy is presumed to leave the landlord. Similarly, *Torrens v. Walker* [1906] 2 Ch. 166. The landlord has the same opportunities as the tenant of examining the state of a sea-wall, and where the circumstances of a particular case rebut the presumption of a special knowledge in the tenants, the rule in *Makin v. Watkinson* cannot be applied.

Their Lordships also held that the acceptance by the defendant of the enhanced rent fixed by the Land Commission was evidence that he agreed to be bound by the condition, whether the condition was authorized or not, that he should maintain the wall in repair as he had done theretofore, for it would be unreasonable to allow him to benefit by a part of the order of the Land Commission whilst allowing him to repudiate another part.

J. W. F. H.

SUBINFEUDATION—TENANT IN CAPITE UT DE CORONA—QUIA EMPTORES
(18 EDW. I. c. 1)—ESCHEAT.

In re Holliday. [1922] 2 Ch. 698.

THE ancient manor of Brough, in Westmorland, was held of the King *in capite ut de corona*, and until 1660, when military tenures were turned into free and common socage, it was held by knight-service. In 1837, Atkinson held Blackacre, a parcel of the manor, as a customary (tenant right) tenant on the rolls. In that year the then lord of the manor granted and enfranchised Blackacre unto and to the use of Atkinson, his heirs and assigns (free from all copyhold and customary tenure, fines, heriots, &c., but), to be holden of the lord of the manor in free and common socage, and by such suit of court as had been usual in respect of the same. In 1910 Holliday, a bastard seized of Blackacre, died a bachelor and intestate. The then lord took possession by escheat, and in 1915 sold to the present petitioner. In 1921 an inquisition of escheat found that

Blackacre on the death of Holliday had escheated not to the lord of the manor but to the Crown. The petitioner then presented this petition for leave to traverse the inquisition.

It was held by Astbury, J., that *Quia Emptores* (18 Edw. I. c. 1) prevented subinfeudation by anyone, including the King's tenants *in capite ut de corona*, unless they obtained the King's licence. After the deed of 1837 (purporting to be a subinfeudation), Atkinson had held not of the lord of the manor but of the superior lord, in this case the King. Therefore, Blackacre in 1910 had escheated to the Crown.

It is necessary to distinguish between tenants of the King *in capite ut de corona* and *ut de honore*. Challis (3rd ed., p. 4, note), says: "The former held by direct grant from the King. The latter held of the King only by reason that the land barony or Honour, of which they held, had come to the King's hand by forfeiture or escheat. They held of the King by the same services as of the barony before it came to the King's hand. These tenures are both properly styled tenure *in capite*, because that phrase only imports that there is no mesne lord between the King and the tenant: and this is as much the fact in the one case as in the other." After Magna Carta (c. 31), as issued in 9 Hen. III., the incidents of tenure of land held of the King *in capite ut de honore* seem not to have differed in any way from those of land held of a mesne lord; thenceforth "tenure *in capite*" seems to mean "tenure *in capite ut de corona*" only.

In the present case the restrictions on substitution and subinfeudation both by Crown tenants and by ordinary freemen were considered at some length. The first of the restrictions created, in the interests of the lords who were losing their services, was on a freeman's right of alienation, and was imposed by c. 32 of Magna Carta (9 Hen. III.), by which no freeman was to "give or sell any more of his land but so that of the residue of the lands the lord of the fee may have the service due to him." In other words, the tenant must leave enough of the holding to perform the services; and this shows, as has been said, that "at the beginning of the thirteenth century the feudal services and dues had ceased to represent, if they ever did represent, anything like the full annual value of the land." This provision probably did not apply to Crown tenants, upon whom, however, a similar restriction was imposed by c. 6 of *De Praerogativa Regis*. (Astbury, J., gives reasons for thinking that the latter statute or ordinance, which appears in the Statutes at Large as 17 Edw. II., st. 1, was originally passed in the early years of Edward I.). The words in question are: "None that holdeth of the King in chief by knights service may alien the more parts of his lands, so that the residue thereof be not sufficient to do his service, except he have the King's licence; but this may not be understood of members and parcels of such lands."

Then came *Quia Emptores*, which gave a free right of "substitution" to freemen (but not Crown tenants, who only obtained such a right in 1 Edward III. (1327)), "so that the feoffee shall hold the same lands or tenements of the chief lord of the same fee, by such service and customs as his feoffor held before."

Quia Emptores could not be construed as removing the restriction on alienation imposed by *De Praerogativa Regis*, because the King's rights, he not being specially named, were not affected by the statute (Co. Litt. 43b). It is arguable, therefore, that the prohibition on subinfeudation introduced by *Quia Emptores* also had no application in the case of tenants

in capite ut de corona. Blackstone seems to have held this view (2 Comm. 91).

Astbury, J., did not consider it necessary to consider the language of *Quia Emptores* as if the point in issue were *res integra*. He relied both on the opinions of text-writers, and on the general terms in which it is stated in the judgments in *Bradshaw v. Lawson* (4 T. R. 443) and *Chetwode v. Crewe* (Willes, 614), that when the lord of a manor conveys part of the lands of the manor the person to whom the land is conveyed must, since *Quia Emptores*, hold of the superior lord.

Even if the wider interpretation of *Quia Emptores* were wrong, the decision would probably still be the same, for Blackstone held, and his conclusion seems to be accepted by Challis (p. 21), that the effect of *De Praerogativa Regis*, c. 6, and 34 Edw. III. c. 15, is to invalidate all subinfeudations made by tenants *in capite* later than the commencement of the reign of Edward I. 34 Edw. III. c. 15 enacts: "That the alienations of lands and tenements made by peoples which did hold of King Henry, great grandfather to the King that now is, or of other Kings before him, to hold of themselves, that the alienations shall stand in their force: saving always to one lord the King his prerogative of the time of his grandfather, his father and of his own time."

But, although the attempted reservation of the services by the lord of the manor in 1837 was illegal, this did not vitiate the whole transaction. Scriven (*On Copyhold*, 7th ed., p. 332), says that in such a case "the estate will become frank-fee and be held of the superior lord," and accordingly the attempted subinfeudation was held good as a "substitution."

It is not likely that the effect of such ancient statutes will often be argued in Court again, and the case is chiefly interesting as a striking example of the fact so often emphasized in the text-books on legal history, that even the practitioner cannot dispense with a knowledge of the history of the law.

S. E. W. B.

IMMUNITY OF A SOVEREIGN—ACTION TO RECOVER COSTS—JURISDICTION OF BRITISH COURTS.

Duff Development Co., Lim. v. Government of Kelantan and Crown Agents for the Colonies. (1922) 39 T. L. R. 96, 187.

THIS case raised the question of the immunity of States in international law. Kelantan, declared by the Foreign Office a sovereign State, having lost in an arbitration with the Duff Company, appealed twice against the decision, but again lost on both occasions. The company brought an action to recover its costs, but failed on the ground that a sovereign State is not subject to the jurisdiction of British Courts for the purpose of execution.

The question at issue was whether by submitting originally to jurisdiction the sovereign State did not submit to such an extent as to enable every order of the Court in executing its judgment to be carried out. The Court of Appeal could not accept this contention, and showed that submission to jurisdiction does not entail submission to execution. Submission admittedly gives certain rights to the other party, but the Court would not go beyond those defined in *The Newbattle* (1885) 10 P. D. 33 and *South*

African Republic v. La Compagnie Franco-Belge du Chemin de Fer du Nord [1898] 1 Ch. 190, unless it could be shown that the State had for some special purpose expressly waived its privileges.

The decision is the logical development of the doctrine of State immunity which prevails in English law, and the necessary corollary of *Bainbridge v. The Postmaster-General* [1906] K. B. 178 and *The Porto Alexandre* [1920] P. 30. But that it is unjust and extremely unsatisfactory, it is impossible to deny; and it is highly desirable in the interests of justice and in order that the British view of international law should not deviate too far from the Continental that the whole question be reviewed and some reform made. The solution of the problem, however, does not lie in approaching it from the view that the question and extent of immunity depends upon the question and extent of submission. Such a method is of little value when the Courts have definitely stated it as a rule of international law that no State can exercise any jurisdiction over another State nor attach its property in execution. Such a broad statement is open to very serious criticism, and it would be more profitable to argue that the rule can only now be accepted subject to qualifications. It is a rule which admittedly rests on the comity of nations whereby the derogation of the sovereignty of one State is justified by the respect which ought to be shown to the sovereignty of another State. But if the immunity demanded by one State is not really necessary for the fulfilment of its duties as a sovereign State, then it is considerably more derogatory to the sovereignty of the other State not to exercise its jurisdiction over property within its borders. The balance must be drawn somewhere, and in the case under discussion the English Courts have perhaps gone unnecessarily far in recognizing State immunity and have set a dangerous precedent. In Continental law, chiefly in theory, a better solution has been reached, but in actual practice in Belgium and Italy a distinction has been drawn between the sovereign acts of a State and those carried out in a private or commercial capacity, and in the latter cases the Courts will exercise full jurisdiction and, if necessary, execute their judgments by attaching property of the foreign State within their jurisdiction. It is submitted that it would be more in consonance with justice if a change were made on some such lines as the distinction which has already been drawn on the Continent, and that it would be an advantage if the Courts of the various countries followed one rule.

W. D. M.

MARITIME PRIZE ON LAND—HOT PURSUIT.

The Anichab and Other Vessels and Craft. [1922] 1 A. C. 235.

WHEN British forces occupied the ports of German South-West Africa in 1914, these craft were transferred inland by rail, some of them to a distance of 300 miles from the coast, to escape capture. Several months later, in the course of military operations, they were seized, some by British military forces, others by duly authorized railway officials.

In the Prize Court (England), Lord Sterndale, P., held that the Crown's rights to prize were not prejudiced by the surrender of German South-West Africa; that prize could validly be seized by authorized persons other than armed forces of the Crown; that these craft were not exempt as "small

boats employed in local trade" under Art. 3 of the Eleventh Hague Convention, as interpreted in the case of *The Deutsches Kohlen Depôt* [1919] A. C. 291; and that property captured on land not by naval forces could be maritime prize: *The Roumanian* [1916] 1 A. C. 124. But since property so captured was only lawful prize if there was continuous hot pursuit from the time it was taken on shore, and there was no evidence of such pursuit in the present case, he released the alleged prize. No indemnity was given for their seizure, as claimed, under Art. 53 of the Fourth Hague Convention, since the Convention expressly made such indemnities a matter for regulation "at the Peace."

In the Judicial Committee of the Privy Council, Lord Parmoor confirmed the President's judgment in all respects, especially distinguishing this case from *The Roumanian*, where there was no question of pursuit.

The rule that enemy property can be lawful maritime prize, though taken neither at sea nor by naval forces, laid down by Lord Mansfield in *Lindo v. Rodney* (1782) 2 Doug. 612n., was re-affirmed by Lord Parker in *The Roumanian*. The present case made it clear that this is only the case if the forces which made the seizure were continuously "getting on as fast as they could after" the alleged prizes "to try and get them."

P. W. D.

VIOLATION OF NEUTRALITY—CLAIM OF TERRITORY—CAPTURE DEFINED—
REPRESENTATION OF REQUISITIONED SHIPS BY APPRAISED VALUE.

The Pellworm and Other Ships. [1922] 1 A. C. 292.

THIS was an appeal from the Prize Court (England), and turned mainly on two points—the moment at which the capture of a ship is legally complete, and the nature of a neutral Power's right to reparation for the violation of its neutrality.

The *Pellworm* and three other German ships were captured by British destroyers off the coast of Holland on July 16, 1917, and requisitioned by the Admiralty, under an order of the Prize Court, on July 31, their appraised value being paid into Court. While in the service of the Admiralty, the *Pellworm* and another were sunk by German submarines. The Dutch Government entered a claim of territory in February, 1918, alleging that the ships had been captured in Dutch territorial waters, and demanded restitution and damages.

In the Prize Court, Lord Sterndale, P., found that there had been an unintentional violation of Dutch neutrality, refused to condemn the ships as prize, rejected the Dutch claim for damages, and adjourned further consideration. In the further hearing, Sir Henry Duke, P., held that the seizures in territorial waters created no proprietary interest in the Dutch Government; that the claim by the Dutch Government was merely on behalf of the German users; that having been requisitioned the ships became the property of the Crown, and for all purposes of prize jurisdiction were represented by their appraised values; that the subject-matter of the claims being the beneficial interest in sums of money belonging to German nationals, these sums fell within Art. 297 of the Peace Treaty (surrendering to the Allies German property in their territory), and must be retained; and accordingly that the claim of the Dutch Government must be dismissed: [1920] P. 347.

Before the Judicial Committee of the Privy Council it was contended for the Procurator-General that since the ships hauled down their flags outside the three-mile limit (which was not denied), they were not captured in territorial waters and there was no violation of neutrality. The Dutch Government denied this, and maintained that the requisition order did not transfer the property in the ships to the Crown; that the Dutch claim was not proprietary, but for a *restitutio in integrum* (*The Valeria* [1921] 1 A. C. 481); and that the Treaty could not affect Dutch rights, being *res inter alios acta*.

Lord Sumner, giving judgment, said that capture consisted in compelling the vessel captured to conform to the captor's will. These ships refused to alter course as ordered after hauling down their flags, and entered Dutch waters against the will of their captors. The capture, therefore, took place in neutral waters, and constituted a violation of neutrality. There must, if possible, be restitution; but the British captors having acted in good faith, there could be no further costs or damages; as Sir William Scott said in *The Vrow Anna Catherina*, 5 C. Rob. 17: "The sanctity of a claim of territory is undoubtedly very high. . . . When the fact is established . . . the property must be restored, notwithstanding that it may actually belong to the enemy; and if the captor should appear to have erred wilfully, and not merely through ignorance, he would be subject to further punishment." The ships still in existence must therefore, whoever their owners, be restored to Dutch waters, without expense to the Dutch Government. The requisition order conferred no right *in rem*, and could be revoked by the Court which made it. The question of the sunk ships was more difficult. Although where a wrongfully captured vessel had been lost the payment of damages was in general a wholly inappropriate remedy, yet it appeared that the obligation to return applied to its appraised value, which represented it for all ordinary purposes, since the Admiralty would otherwise make a profit out of their own wrongdoing. The two ships and the appraised value of the other two must therefore be surrendered to the Dutch Government.

P. W. D.

CONTRACT—SPECIAL LIABILITY CLAUSE—BURDEN OF PROOF.

H. & E. Smith, Lim. v. Great Western Railway Co. [1922] 1 A. C. 179.

THE point at issue in this case was as follows: When in a contract a clause exists imposing liability on a party under certain circumstances only, how far is it permissible by inference alone to assume the existence of such circumstances?

Smith made a contract with the Great Western Railway Co. for the carriage of perishable and other goods at owner's risk. In consideration of the fact that all goods were carried at a lower rate, the following clause was contained in the contract: "We agree to relieve you from all liability for loss, damage, misconveyance, misdelivery, delay or detention, except upon proof that such loss, &c. . . . arose from *wilful misconduct* of your servants." The question to be decided was whether it could be inferred from the circumstances surrounding the disappearance of the goods consigned by the plaintiffs that there had been wilful misconduct on the part of the defendants' servants.

A parcel of boots was handed in to the carman of the railway company consigned to Wilton, and this parcel was traceable as far as the parcels office at Birmingham Station, but no further. The defendants were not very willing either in the information or assistance which they gave to the plaintiffs to trace the whereabouts of the lost article, and they offered no evidence or suggestion as to its fate. In fact, they gave no help whatsoever to assist the owners in tracing the boots.

Held, that it was incumbent upon the plaintiffs definitely to establish the *wilful misconduct* of the defendants' servants, and that they had failed to do this.

The following points deserve attention:—

- (1) The decision is based on the special terms of the contract and not on the defendants' liability as common carriers.
- (2) The evidence upon which it is asserted that wilful misconduct is based must be conclusive. If alternative inferences can be reasonably drawn, then the party trying to prove one particular inference fails: *Kerr v. Ayr Steam Shipping Co.* [1915] A. C. at p. 235.
- (2) (a) The following extract from *Wakelin v. London and South Western Railway Co.*, 12 A. C. 41, illustrates the point of burden of proof:—
 "It is incumbent upon the plaintiff in this case to establish that her husband's death has been caused by some negligence of the defendants; some negligent act or omission to which the death of the husband is attributable. That is the fact to be proved. If that fact is not proved the plaintiff fails, and if in the absence of direct proof the circumstances which are established are equally consistent with the allegation of the plaintiff as with the denial of the defendants, the plaintiff fails for the very simple reason that the plaintiff is bound to establish the affirmative of the proposition "*Ei qui affirmat, non ei qui negat, incumbit probatio*"—*per* Halsbury, L.C., 12 A. C. at p. 45.
- (3) There is no general rule which one can lay down that, where a particular set of circumstances exist, then the inference drawn must be so and so. Hence this case must be distinguished from that of *Curran v. Midland Railway* [1896] 2 I. R. 183.
- (4) The plaintiff in the contract has taken upon himself the burden of proving the *wilful misconduct* of the defendant. Suppositions and assumptions must be avoided, and the evidence must conclusively point to the existence of such conduct.

Note on Curran's Case.

Here the agreement exempted the defendants from liability unless such liability should be occasioned by their intentional and wilful neglect or misconduct. Some pigs consigned from Ireland to England were "lost" in transit.

The question was whether from the state of facts as disclosed the inference of wilful misconduct or intentional negligence could be drawn. It is a well-known maxim of law that "a state of facts once proved to have

existed is presumed, in the absence of evidence to the contrary, to continue ”
—*per* Palles, C.B.

In *Curran's Case* the defendants offered no explanation, and were held liable in conversion. But in this case the plaintiffs alleged that the goods were *lost*, and the presumption that they were still in the possession of the defendants was thus negatived by the plaintiffs' pleadings.

H. M. A.

REPORTS OF THE UNIVERSITY AND COLLEGE LAW SOCIETIES.

CAMBRIDGE UNIVERSITY LAW SOCIETY.

OFFICERS :

<i>Michaelmas Term, 1922.</i>		<i>Lent Term, 1923.</i>	
<i>President</i>	P. G. R. WHALLEY (Caius).	<i>President</i>	W. R. TREVOR-SMITH (Downing).
<i>Vice-President</i>	W. R. TREVOR-SMITH (Downing).	<i>Vice-President</i>	T. C. HUMPHREYS (Trinity Hall).
<i>Treasurer</i>	H. A. HOLLOND, M.A. (Trinity).	<i>Treasurer</i>	H. A. HOLLOND, M.A. (Trinity).
<i>Secretary</i>	T. C. HUMPHREYS (Trinity Hall).	<i>Secretary</i>	W. E. JENKINS (Trinity Hall).
<i>Assistant } Treasurer }</i>	W. R. TREVOR-SMITH.	<i>Assistant } Treasurer }</i>	R. WILKINSON, B.A. (Pembroke)

At a meeting of the ~~Executive~~ Committee held at the beginning of the Michaelmas Term, 1922, P. G. R. Whalley (Caius) was elected President and Mr. Hollond was re-elected Treasurer. Subsequently the Committee elected W. R. Trevor-Smith (Downing) Vice-President and Assistant Treasurer, and T. C. Humphreys (Trinity Hall) Secretary.

On October 28 a joint meeting with the Cambridge University Medical Society was held, when the Societies had the honour of entertaining Mr. Travers Humphreys (Senior Counsel to the Treasury) and Dr. G. F. E. Prideaux. The form of meeting was a debate, proposed by Mr. Humphreys and opposed by Dr. Prideaux, on the motion: "That in the opinion of this House the law of England regarding the criminal responsibility of the alleged insane is reasonable and fair, and in the interests of justice no alteration is called for."

The motion was lost by 39 votes to 27.

On November 22 a House of Lords appeal case was heard before His Honour Judge H. G. Farrant, the President (Mr. P. G. R. Whalley), and the Vice-President (Mr. W. R. Trevor-Smith). The facts were taken from the case of *Folkes v. King*, 39 T. L. R. 77—C. A.

For the Appellant.—J. Hulme (St. John's); with him, S. E. Weber-Brown (Trinity Hall).

For the Respondent.—H. M. Abrahams (Caius); with him, T. C. Humphreys (Trinity Hall).

The appeal was allowed.

On February 1 the change of officers took place. Mr. W. R. Trevor-Smith (Downing) was elected President unopposed. The Society afterwards debated the motion: "That an advocate should accept a brief irrespective

of his belief in the justice of his client's claim." Mr. A. L. Goodhart, M.A. (Corpus Christi) proposed the motion, and Mr. W. D. Johnston (Christ's) opposed. Mr. H. M. Abrahams (Caius) spoke third, and Mr. R. Branston (Christ's) was the fourth speaker. After an interesting debate the motion was carried by 24 votes to 4.

On February 17 Sir Henry Curtis-Bennett, K.C., was going to honour the Society by reading a paper on "Practice in the Courts," but, owing to illness in his family, he was unfortunately obliged to cancel his visit. The Society hopes it will have the opportunity of hearing the distinguished counsel at some future date.

On March 7 Professor W. W. Buckland, F.B.A., read a most interesting and entertaining paper on "Maitland."

W. E. J.

CHRIST'S COLLEGE LAW SOCIETY.

<i>Michaelmas Term.</i>			<i>Lent Term.</i>		
<i>President</i>	.	W. D. JOHNSTON.	<i>President</i>	.	F. V. B. EDGE.
<i>Secretary</i>	.	F. V. B. EDGE.	<i>Secretary</i>	.	J. A. C. TAYLOR.
<i>Easter Term.</i>					
<i>President</i>	.	J. A. C. TAYLOR.			
<i>Secretary</i>	.	C. JOOSTE.			

THE Society has continued to be very active during the past year, the membership being approximately eighteen in number, the majority of whom are reading for the First Part of the Tripos. Meetings have been held every Wednesday evening during full Term.

Papers have been read on "The Legal Position of Married Women," "The Larceny Act, 1916," "Proportional Representation in Parliamentary Elections," and "Bonorum Possessio." Three debates have been held, and a number of cases involving different branches of law have been tried. In the Michaelmas Term a joint meeting with Clare College Law Society took place by the kind invitation of the latter, and an interesting and ingenious case on contract was tried on appeal.

CLARE MOOT CLUB.

<i>President</i>	.	J. W. BOOTH.
<i>Secretary</i>	.	A. J. N. PATTERSON.

THE first meeting of the year was held on October 24, when the following motion was debated: "That, in the opinion of this House, the House of Lords is in urgent need of reform."

On November 8 J. W. Booth presided over cases in tort and crime.

On November 22 Professor Kenny read a most interesting paper on "The Trial of the Calas Family."

At the last meeting of the Term there was a joint moot with the Christ's Law Society, when an appeal case in contract was heard.

On the Bench.—J. W. Booth (Clare), W. D. Johnston (Christ's), and R. P. Winfrey (Christ's).

For Appellant.—J. A. C. Taylor (Christ's) and C. Whybrow (Christ's).

For Respondent.—F. H. M. Jones (Clare) and T. C. H. Lea (Clare).

In the Lent Term a debate was held, at the first meeting, on the following motion: "That this House would welcome a codification of English law."

On January 31 cases were heard in contract and crime.

On February 23 a mock trial was held in the College Hall, in conjunction with the Debating Society. M. E. Holdsworth (Christ's) presided. W. A. MacFarlane, J. W. Booth, and F. H. M. Jones were for the prosecution. T. le G. Nel, A. J. N. Paterson, and T. C. H. Lea were for the defence. The prisoner was charged with murder and found guilty.

The annual dinner of the Society was held on February 24, the guests being M. E. Holdsworth and T. le G. Nel.

The last meeting of the Term was held on March 7, in conjunction with the Pembroke Law Society; H. E. Salt (Trinity) presided.

A. J. N. P.

THE CRANWORTH LAW SOCIETY OF DOWNING COLLEGE.

President B. L. HENSON.

Vice-President D. E. P. EVANS.

Secretary A. D. P. THOMSON.

THE first meeting of the present academical year was held in Mr. Yapp's rooms on October 19, when the President (Mr. B. L. Henson) read a paper on "The Administration of Justice in Mediaeval England."

At the second meeting of the Term, on November 2, the Society was entertained by Professor and Mrs. Hazeltine at West Lodge, and constituted a Court of Criminal Appeal in the case of *R. v. Boosey*, a conviction of murder being appealed against.

On the Bench.—Professor Hazeltine, B. L. Henson, and W. R. Trevor-Smith.

Counsel for the Appellant.—A. K. Yapp and G. F. Darlow.

Counsel for the Crown.—D. E. P. Evans and R. Freedman.

At the third meeting of the Term the motion: "That the jury system should be abolished" was debated.

G. F. Darlow proposed the motion; R. E. Seaton opposed. A. D. P. Thomson spoke third; Gwyn Morris spoke fourth.

The fourth meeting of the Term, on December 5, was in the form of a joint debate with the College Debating Society, on the motion: "That, in the opinion of this House, the law of divorce is in need of reform."

Proposed by W. R. Trevor-Smith; opposed by S. Levy Simpson. G. Goukassian spoke third; and D. E. P. Evans spoke fourth.

The first meeting of the Lent Term was held in Mr. Yapp's rooms on January 25, when the following elections were made:—

To be President.—B. L. Henson.

„ *Vice-President.*—D. E. P. Evans.

„ *Hon. Secretary.*—A. D. P. Thomson.

At the second meeting of the Lent Term, Professor and Mrs. Hazeltine entertained the Society at West Lodge, and Dr. Kenny read his excellent paper on “The Trial of the Calas Family,” illustrating the laxity of the French rules of evidence.

EMMANUEL COLLEGE LAW SOCIETY.

President Prof. H. D. HAZELTINE.

Vice-President K. M. PANJABI.

Secretary P. F. CAMMIADE.

Members, 16.

On October 30 the President read a paper on “Roman Law and Mediaeval Europe.”

On November 10 Dr. Oliver heard an appeal from conviction at Cambridge Assizes of attempting to obtain money by false pretences.

Counsel for Appellant.—P. F. Cammiade and K. T. Mangalmurti.

Counsel for Respondent.—A. K. Little and W. J. P. Wilson Walker.

On November 24 Dr. Carr presided as Judge at a mock trial—a breach of promise case.

Counsel for Plaintiff.—A. L. Sacher and A. K. Little.

Counsel for Defendant.—P. F. Cammiade and W. J. P. Wilson Walker.

On January 29 the Society entertained the Caius College Law Club, when a debate was held. It was moved that the time had come for an alteration in the existing basis of criminal punishment.

On February 23 H. E. Salt, assisted by K. T. Mangalmurti and E. H. Johnson, heard an appeal on the question of consideration in a contract.

Counsel for Appellant.—A. K. Little.

Counsel for Respondent.—P. F. Cammiade.

On March 5 Professor C. S. Kenny read a paper on “The Trial of the Calas Family.”

On Saturday, June 2, it is proposed to hold the annual dinner.

P. F. C.

FITZWILLIAM HALL LAW SOCIETY.

President . Mr. W. F. REDDAWAY, M.A., F.R. Hist. S.

Vice-Presidents { Dr. P. H. WINFIELD,
Mr. C. J. B. GASKOIN, M.A.

Treasurer R. S. LEWIS.

Secretary J. R. W. ALEXANDER.

On October 25 a discussion on the maxim “Vir et uxor consentur in lege una persona” had to be abandoned owing to the large amount of private business.

On November 10 A. J. Knight read an entertaining paper on "Master and Servant."

On November 24 L. F. Coutts read a paper on "From Status to Contract."

On December 6 the annual dinner was held at the Cambridge Union Society. The Society took the opportunity of bidding farewell to Dr. P. H. Winfield (St. John's), whose absence at Harvard has been keenly felt.

On January 31 Mr. C. J. B. Gaskoin, M.A., gave an account of the wartime postal censorship, and of the litigation, involving many questions of international law, in which it was engaged, in a paper on "*The Dirigo and Others (The Neumond Group)*—A Prize Case from the Great War." Many specimens of the decoded correspondence were exhibited and explained.

On February 14 Mr. H. Barnes (Jesus) read a most instructive paper on "The History of Punishment." The discussion which followed was made the more interesting by the observations, from a medical point of view, of Dr. E. H. Ezard, M.A., M.D. (Edin.).

On March 12 Mr. A. D. McNair, C.B.E., M.A., LL.M. (Gonville and Caius), presided at a moot, at which J. R. W. Alexander and J. W. Whitlock appeared for the plaintiffs, and A. J. Knight and R. S. Lewis for the defendant. The plaintiffs sued the defendant for trespass to land and conversion of goods under the following circumstances:—

The defendant in 1914 lent two books to a law student, who in 1915 sold the books to the plaintiffs (booksellers). He was later killed in the War. In 1923 the defendant learns that the two books (with the defendant's name and college on the fly-leaf struck out with a pen) are for sale at the plaintiffs' shop. He goes there and peaceably takes away both books—one from inside the shop, and the other from a shelf abutting the highway.

Judgment was entered for the defendant.

On May 2 a full-dress mock trial, the first since pre-War days, will be held before His Honour Judge H. G. Farrant. J. R. W. Alexander and J. M. Rich will appear for the plaintiff, and A. J. Knight and T. R. R. G. Fendick, B.A., LL.B., for the defendant, the facts of the case being as follows:—

A, who is B's rival for Miss C's hand, wrote the following letter to that young lady:—

"Last night B went to the Hunt Ball. I am sorry to say that at supper he was the worse for drink."

At the last moment A's conscience hurts him, and he leaves the letter, face down, on his desk. In the morning his bed-maker, while doing the room, picks up the letter and reads it. Having a grudge against both A and B, she takes the letter to B's tutor, who immediately sends B down for the rest of the Term. B sues A for libel, and A defends on these grounds: (1) That the letter was not published by him; (2) that the statement contained in the letter was true; and (3) that the statement was not libellous.

J. R. W. A.

GONVILLE AND CAIUS COLLEGE LAW CLUB.

<i>President</i>	.	.	.	.	.	H. M. ABRAHAMS.
<i>Secretary</i>	.	.	.	.	.	J. H. REED.
<i>Treasurer</i>	.	.	.	.	.	A. E. RAINBOW.

THE twenty-fifth meeting of the Club was held on October 16, 1922, when seventeen new members were elected, bringing the total number up to forty.

Mr. A. D. McNair then read a paper on "The Constitution of the Irish Free State."

On October 30 an interesting paper on "The Trial of Mrs. Maybrick" was read by the President.

On November 13 a meeting was held at Trinity Hall in conjunction with the Trinity Hall Law Society. The following was the subject of the joint moot:—

A, a member of a shooting party, brings an action against B, another member of the party, for injuries sustained from a shot fired by B without negligence.

Judgment was given for B on the authority of *Stanley v. Powell* [1891] 1 Q. B. 86, whereupon A appeals.

Counsel for the Appellant.—S. E. Weber-Brown and H. Bader (Trinity Hall).

Counsel for the Respondent.—R. H. Finch and P. G. Whalley (Caius).

On November 27 a dinner took place in Caius College, with the Master, Professor W. W. Buckland and Mr. Hollond as guests of the Club.

On January 29, 1923, a joint meeting was held with the Emmanuel Law Society, at Emmanuel. The subject debated was: "That the time has arrived for the reconsideration of the basis upon which the punishment of crime is founded."

For the motion, G. G. Fitzmaurice and A. A. Capewell (Caius); against, G. D. Khosla and W. J. Alderman (Emmanuel).

On February 12 Mr. L. Abrahams read a paper on "A Country Solicitor's Life."

J. H. R.

PEMBROKE COLLEGE LAW SOCIETY.

OFFICERS:

<i>Michaelmas Term.</i>					<i>Lent Term.</i>				
<i>President</i>	.	.	F. St. L. SEARLE.		<i>President</i>	.	.	J. M. ALLEN.	
<i>Vice-President</i>	.	.	J. M. ALLEN.		<i>Vice-President</i>	.	.	G. A. BLOCK.	
<i>Secretary</i>	.	.	E. G. RAYNES.		<i>Secretary</i>	.	.	C. F. SHOOLBRED.	

IN the October Term the Society began with a debate on the reform of the treatment of criminals. The motion was proposed by H. W. S. Home-wood and opposed by R. Wilkinson, G. Murly Gotto and R. A. Nisbet speaking third and fourth respectively.

On November 10 Mr. A. L. Goodhart (Corpus Christi) addressed the Society on some leading American cases.

The annual mock trial (in full dress) took place on November 22. Dr. Carr (Trinity Hall) acted as Judge. *Counsel for the Prosecution* were E. G. Raynes and G. A. Block; *for the Defence*, F. St. L. Searle and E. R. Appleyard. A male and a female prisoner were indicted for murder, and the case turned on several points of pleading. Sentence of death was passed on the male prisoner, but his companion was acquitted.

The annual dinner was held on December 2, and proved a very cheerful affair.

In the Lent Term, apart from the ordinary business meetings, we were the guests of the Trinity Hall Society on February 21, when Dr. Carr gave an address on "*The Aubrey Peerage Case*."

On March 4 Mr. C. H. Ziegler read a paper on "*The Light Side of Law*," and on March 7 the Society visited the Clare College Law Society, and a criminal appeal case was argued.

F. St. L. S.
J. M. A.

ST. JOHN'S COLLEGE LAW SOCIETY.

<i>President</i>	.	.	.	.	S. J. BAILEY.
<i>Vice-President</i>	.	.	.	Dr. P. H. WINFIELD.	
<i>Secretary</i>	.	.	.	N. E. WIGGINS.	
<i>Treasurer</i>	.	.	.	G. D. SHAW.	

The Society held three meetings during the Michaelmas Term. At the first Mr. G. C. Coulton (St. John's) gave a paper on "*Village Life in the Middle Ages*." The second meeting was a debate with Newnham College on the motion: "*That the practice of the law is incompatible with honesty*." S. Hulme and Miss Farmer proposed the motion, and it was opposed by Miss J. Bird and N. E. Wiggins. The motion was lost by 35 votes to 17. At the third meeting Mr. H. Barnes gave a paper on "*Punishment*."

At the opening meeting of the Lent Term Professor Kenny read a paper on the French criminal case of the Calas family.

On February 19 a moot case—*R. v. Mangelwurzel*—was held before Mr. Hollond. Colonel Fozzle had sliced a golf ball into Mangelwurzel's field, and, in attempting to recover the ball, encountered the farmer and endeavoured to push him aside. The latter thereupon knocked him down and kept the ball. Mangelwurzel was convicted of larceny and assault before the Petty Sessional Court. He appealed, and the convictions were quashed.

Counsel for the Crown were J. S. Snowden and D. C. Baker; *for Mangelwurzel*, G. D. Shaw and R. N. Jackson.

On March 5 a moot case was argued before Mr. A. D. McNair; S. Hulme and N. E. Wiggins were *Counsel for the Plaintiffs*, while C. A. Shillan and S. J. Bailey represented the *Defendant*.

SIDNEY SUSSEX COLLEGE LAW SOCIETY.

President	J. C. MILNER.
Hon. Vice-President	E. J. PASSANT, M.A.
Hon. Secretary	C. F. K. MELLOR.

Members, 15.

APART from the general business meetings, the following meetings were held:—

On November 3 Dr. Carr (Trinity Hall) told us the story of the *Aubrey Peerage Case*.

On December 5 the case of *Mercer v. South Eastern and Chatham Railway Co.* was heard in the Court of Appeal.

On the Bench.—R. W. Turner.

For Appellant.—J. C. Milner and C. M. Glover.

For Respondent.—C. F. K. Mellor and J. Renwick.

On January 30 Mr. Goodhart (Corpus Christi) read a paper on American law.

The meeting on February 13 took the form of a debate, when the motion: "That a defamatory gramophone record is a slander and not a libel" was discussed.

On February 20 a mock trial was held in the College Hall.

On the Bench.—Dr. Oliver (Trinity Hall).

Counsel for the Prosecution.—Mr. E. J. Passant, M.A., and A. J. West-Walker.

Counsel for the Defence.—R. W. Turner and F. A. Rice.

The indictment was for the felonious receiving of goods knowing them to be stolen. A verdict of guilty was returned.

TRINITY COLLEGE LAW SOCIETY.

Michaelmas Term.			Lent Term.		
President	J. W. F. HILL.		President	J. D. FIELD.	
Treasurer	J. D. FIELD.		Treasurer	E. D. WAINWRIGHT.	
Secretary	E. D. WAINWRIGHT.		Secretary	J. C. P. BRUNYATE.	

Members, 30.

THE twenty-second meeting, on October 19, was devoted to private business.

At the twenty-third meeting, on November 2, the following case was heard on appeal before H. E. Salt, R. R. A. Walker, and J. W. F. Hill.

For the Appellant.—E. D. Wainwright.

For the Crown.—J. D. Field.

Docker, having a spite against his late employer, Shipper, wrote to him saying: "You had better look to your warehouse, you blackguard, because it is going to be done in.—A. D." Shamrock Johns, a private detective, was sent to keep an all-night watch on the premises. Docker went at night to the warehouse with a bag of stones, and threw one at each of the windows in succession. Johns was standing behind a blind, and the first stone broke

the window and struck him in the eye. Septic poisoning set in, and Johns died.

The following questions were put to the jury:—

(1) Was the act of Docker the direct cause of Johns' death?—Yes.

(2) Was Docker guilty of an intent feloniously to injure Shipper's property?—Yes.

(3) Had Docker reasonable cause to believe that someone might be watching from the windows?—Yes.

On these findings the jury was directed to find a verdict of murder. Docker appealed on the ground that these findings do not in law amount to murder. Under the Malicious Damage Act, 1861, the breaking of windows does not amount to a felony; but in view of the finding of felonious intent the appeal was dismissed.

At the twenty-fourth meeting, on November 30, Professor Hazeltine read an entertaining paper on "The Survival of Savagery in Modern Law."

On December 14 a meeting for private business was held.

Professor Kenny read a paper to the twenty-sixth meeting, on January 18, on "The Trial of the Calas Family." It was followed by a very interesting discussion.

At the twenty-seventh meeting, on February 8, Mr. Barnes read a paper on "The History of Punishment."

The annual dinner was held on February 22, when the guests were Sir Chartres Biron, His Honour Judge Farrant, and Professor Hazeltine. Sir Chartres Biron spoke on "The Duties of an Advocate."

TRINITY HALL LAW SOCIETY.

Michaelmas Term.

President . J. R. ROXBURGH, M.A.
Vice-President . . H. HILLABY.
Secretary . . W. E. JENKINS.

Lent Term.

President . J. R. ROXBURGH, M.A.
Vice-President . W. E. JENKINS
Secretary . . T. W. G. SPARROW.

Members, 54.

At the first meeting of the Michaelmas Term Professor Kenny read a paper of great interest, his subject being "The Trial of the Calas Family."

On November 13 the Society entertained the Caius College Law Club. An appeal case, based on *Stanley v. Powell*, was argued. S. E. Weber-Brown appeared for the Appellant, and R. H. Finch (Caius) for the Respondent. Dr. Oliver, who was acting as Judge, dismissed the appeal.

On November 18 the Society held a dinner. Mr. Justice Romer honoured the Society by taking the chair. Besides thirty-nine members of the Society, there were present five guests, including Mr. Travers Humphreys and Mr. Percival Clarke, and nineteen other visitors. The dinner was a great success.

The last meeting of the Term took the form of a mock trial for burglary before His Honour Judge Farrant. W. E. Jenkins and S. E. Weber-Brown prosecuted; T. C. Humphreys and H. Hillaby appeared for the defence. The jury could not agree as to their verdict.

For the Lent Term three meetings had been arranged.

The first, a joint debate with King's College Law Society (at King's) was unavoidably postponed.

On February 10 Mr. J. R. Pearson (Chief Constable of the Borough of Cambridge) read a most instructive paper on "The Police Force as a Career."

On February 21 the Society entertained the Pembroke College Law Society. Dr. Carr read a paper on "The *Aubrey Peerage Case*." This case, though of no constitutional importance, was of the very greatest interest, and, as Dr. Carr said, it showed that no case was lost until the ultimate Court of Appeal had dismissed it.

Arrangements are being made for an old member of the Hall to address the Society at the first meeting of next Term, to be held on April 28.

BOOK REVIEWS.

Interpretations of Legal History. By ROSCOE POUND, Ph.D., LL.D., Carter Professor of Jurisprudence in Harvard University. Cambridge University Press. 1923. xvii and 171 pp. (Price 12s. 6d. net.)

To this little volume Professor Hazeltine contributes eight pages of preface; more useful than contributed prefaces usually are, for it will afford inexperienced readers great help in grasping the drift of a brilliant but somewhat difficult book. Dr. Pound's compact treatise is closely packed with thoughts, and abounds with suggestions for further thinking. In its pages the wide range of his knowledge, and his facile command of it, are as conspicuous as are his wealth of diction and his ready command of phrases apt yet striking. It displays the same powers, and emphasizes many of the same truths, with which his *Philosophy of Law* had already familiarized us. The abundance of references furnished by the footnotes show by how encyclopædic a range of reading—aye, and of writing—the materials of the volume have been accumulated. Hence he has the means (too seldom possessed by authors who endeavour to write philosophically) of readily testing the abstract by the concrete, and of showing in individual instances that his generalizations hold good. Very obvious is the advantage which his familiarity with Roman law gives him over most American jurists; it affords a warning to English legal Faculties not to lessen the place accorded in their curricula to Gaius and Justinian. There are, Dr. Pound well says, three weapons for the hand of a jurist—History, Philosophy, Analysis. Each of them he wields with skill. A reader who takes up this brief collection of lectures will not soon put it down; especially if he be one of those who had the good fortune to hear its contents orally delivered at Cambridge last year and can delight himself in recalling the merits of their delivery.

Dr. Pound sets out from the fundamental problem which creates the need for a philosophy of law to solve it—the paradox that law must of necessity be stable, and yet cannot in any progressive community stand still. How can this stability be reconciled with this flexibility? He reviews five ways in which it has been attempted so to interpret the history of law, and determine the dominant factor in its evolution, as to solve this problem; but he discards each of them as outgrown. Finally, he offers us a sixth, of whose utility and whose permanence he is more hopeful.

The earliest attempts to solve the secret of the evolution of law took, as was to be expected, ethico-religious forms; of which Kant's teaching affords a conspicuous instance. The Roman jurists had worked by the light of Greek stoicism; and, similarly, it was in the light of Kant's moral ideal of Right that Savigny and the other early leaders of the historical school did their great work. They moulded the legal theories of the nineteenth century; which "was in law, and in everything else, the century of history," as the eighteenth had been the century of philosophy. To the eyes of Blackstone our English system seemed like a solid old feudal castle, conveniently modernized (p. 40); but the Savignians would have taught him to regard it as an ever-growing tree. They did a permanent service in placing legal history upon a foundation of solid research instead of superficial conjectures. But when the twentieth century drew near, the influence of their school began to decay. Its decadence was hastened by the Great War; which called forth an outburst of initiative and innovation, thereby disinclining men for the passive conception of law as a thing which was "to be found, and not to be made." That passivity had been copied by Savigny, indirectly at least,—probably directly—from Burke's reaction against the kindred outbursts of the French Revolution; just as Bishop Lloyd and the other founders of the Tractarian movement moulded their theology on that of the French priests whom those outbursts had driven to Oxford. The guillotine was a tree that sometimes bore most perverse fruits.

For some time past the influence of Kant upon European thought had been giving place to that of Hegel. Those who resisted this change complained that the new philosophy, whose fundamental principle was the identity of contradictories, was too nebulous for practical life. "From eyes profane a veil this Isis screened"; so that she could neither guide the lawyer nor even hand him a compass. As Taine said, Hegel built downwards from above; whilst jurists had been accustomed to the safer method of building upwards from below. But there was a marvellous glow in Hegel's insistence upon Freedom as the ideal which law existed to secure. By the side of this, Kant's conception of Right as that ideal seemed but chilling. So a second interpretation, the political, came into vogue. It idealized freedom, until law came to be regarded as actually an evil though a necessary one. The legislator's only function was to take care that the perfect liberty of each citizen was not so exercised as to interfere with the like liberty of the others. The Hegelians taught that history, by an inevitable organic growth, was gradually realizing in law this ideal of free individual self-assertion. That teaching Dr. Pound finds underlying the writings of Sir Henry Maine. Maine's famous generalization that legal progress has been a movement from status to contract is Hegelian. But, familiar though that generalization has become, Dr. Pound challenges it with courage and success. He points out (pp. 54-62) that the review of Roman law, from which it was mainly drawn, was but a partial one; that the long history of English law fails to corroborate it; and that, for at least a generation past, both English and American law have been restricting the power to contract and have been creating new species of status. Every owner of house property is at present painfully aware of the fact.

But the political interpretation lost ground when a third one based on ethnological analogies arose to question it. In the latter part of the nineteenth century, the epoch-making work of Darwin gave to the biological sciences a sudden importance which readily suggested biological views of

law. Differences in legal institutions were eagerly traced to differences of anthropological species; though in reality, in our modern world, differences of law, as Dr. Pound says, "are as independent of race and language as are fashions of dress among the upper classes of society" (p. 80).

A fourth attitude, that of economic interpretation, was meanwhile acquiring influence under the increasing pressure of the social difficulties brought about by modern industrialism; and from 1880 onwards this attitude had great vogue. Legal history became merely a history "of wants and work." Whatever social class was dominant for the time being was, we were told, sure to mould the contemporary law into a form that would serve its materialistic group-interests. Such a theory was not likely to have an elevating effect upon public opinion; for, as our author says, "It is not likely that law-making will be better than the picture of it put before the law-maker" (p. 113).

A fifth interpretation is possible, which would lay stress upon an element that the preceding ones ignored—that of personality. Might not legal history be chronicled in terms of men as truly as in terms of ideas? It certainly might in primitive periods, or in other times of rapid transition. There are conspicuous figures—the law-making monarch, the innovating magistrate, the persuasive advocate. We think of Hammurabi and Alfred; of Mansfield and Marshall; of Daniel Webster, Judah Benjamin, and George Mellish. To the historian with an eye for the picturesque, such a treatment offers great opportunities. But it could never be more than a fragmentary presentment—a drama visible only when the lightning happened to flash.

From this least comprehensive of all the interpretations we pass on to the last, and, in Dr. Pound's estimate, the best. A true interpretation of legal history must take a comprehensive cognizance of four elements—the men by whom, the materials with which, the circumstances under which, and the purposes for which, law has been developed. Kohler, of Berlin, who died in 1919 (and whom our author regards as having "come nearer than anyone else in modern times to taking all law for his province"), approximated to such a view in his Civilization theory. Defining "civilization" as the social development of human powers towards their highest form, he treated bygone law as a product of it, present-day law as a support of it, and, moreover—stepping beyond the ancient jurists and the mediaeval ones—future law as a means of forwarding it. But something further is felt by Dr. Pound to be necessary; a perfectly satisfactory view must allow more definitely for intentional creative activity in legal change, must be more "instrumentalistic." He sees that the evolution of law does not really take, as Hegelians taught, a course inevitable. His final interpretation consequently is, to think of law as a kind of social engineering; the business of eliminating waste, and precluding friction, in the life of the nation.

Comprehensive as thus is Dr. Pound's review of these wide successive fields of speculation, it is carried out with minute accuracy of details. Doubtless his assiduous labours in botanical research trained him early to habits of scientific precision of statement. In so copious a survey few authors could avoid a slip. But none are obvious. Were there a reader ungrateful enough to peer for errors with a microscopic eye, even he would raise only questions of opinion rather than of fact. One may hesitate to agree with Dr. Pound in putting into contrast with the lives of "academic jurists," like Savigny and Maine, Montesquieu's supposed

"wholly political career." Montesquieu's ten years of judicial work, followed by a full quarter-century of literary study and authorship, would by some be regarded as a career much less political than those of that Geheimstaatsminister and that Indian administrator. Again, though it admittedly would have seemed natural enough that Austin, being a Chancery barrister, should always have "thought of law in terms of the law of land" (p. 155), yet one at least of Austin's assiduous readers has carried away from his pages a very different impression. He has long felt it a paradox that this Chancery barrister, who probably had never attended sessions or assizes, should so often have unduly narrowed his generalizations by thinking of law in its criminal form alone.

In these present days of national and international gloom, all readers of Dr. Pound's book will rejoice to find that so profound and so careful a lawyer takes a hopeful view of legal evolution. To the searching eye of the greatest critic of modern life the history of law disclosed only a disheartening spectacle.

"Es erben sich Gesetz' und Rechte

Wie eine ew'ge Krankheit fort;

. . . Vernunft wird Unsinn, Wohltat Plage."

But the generations that have elapsed since Goethe wrote have done enough to warrant Dr. Pound in taking a brighter estimate. He frowns repeatedly (pp. 67, 115, 164) upon all "juristic pessimism," and is ready to welcome the changes which this twentieth century seems likely to bring; shrinking indeed in no wise from its readiness to sacrifice the time-honoured rights of the private citizen to the interests, real or supposed, of the community at large.

An emphatic and a welcome stress is laid by him upon the important part in those coming changes which ought soon to be played by our academic legal Faculties. Maitland long ago predicted that the enormous and ever-increasing accumulation of law reports in the United States—"an infinite variety which no fortune could purchase and no capacity could digest," as Gibbon said of the Roman jurists' lucubrations—must soon cause judge-made law there to be crushed by its own weight, and will compel American tribunals to take text-book law instead of judicial precedent as their habitual guide. A kindred prophecy is uttered by our author. "More and more we must rely upon jurists for creative work" in Anglo-American law (p. 164); our legal authors and teachers will come "to lead courts and legislatures, not to follow them."

That a writer on law may be equal to even that high task is abundantly proved by this new volume of Dr. Pound's.

COURTNEY KENNY.

A History of English Law. By W. S. HOLDSWORTH, K.C., D.C.L., of Lincoln's Inn; Vinerian Professor of English Law in the University of Oxford. Vol. I. Third edition (rewritten). London: Methuen & Co., Lim. 1922. xlv and 706 pp. (Price 25s. net.)

THE first three volumes of Dr. Holdsworth's *History of English Law* have been prized for many years by students of law and history. The first edition of the first volume appeared in 1903, the first edition of Volumes II. and III. in 1909. But ever since 1909—except during a part

of the war period, when he was engaged in important duties for the Government—Dr. Holdsworth has been steadily at work in writing the history of the law from 1485 onwards and in increasing and perfecting his knowledge of the medieval periods. As the fruit of these devoted and extensive studies in his chosen field—studies which have occupied much of his time for more than twenty years—Dr. Holdsworth now presents us with a new and enlarged edition of his work in seven volumes. For this edition he has revised and largely rewritten the first three volumes; while in the remaining four volumes, which are altogether new, he has brought down the history of the sources, the general development, and the rules of law, from the close of the middle ages to the end of the seventeenth century.

Only the first of the seven volumes of this new edition has as yet appeared. While it will be necessary, therefore, to postpone for a future number of the *Cambridge Law Journal* the writing of a review of the work as a whole, it may be remarked at once that a history of English law, designed upon this monumental scale and written by the trained hand of a great legal scholar, will be a work unique in the literature of our law. Reeves' pioneer treatise, a five-volume history of the law to the death of Elizabeth, has long been antiquated and below the standard of our present critical age of scholarship. Pollock and Maitland's classic volumes—comprehensive and detailed within their scope of period and subject-matter—do not bring the history of the law, save only by incidental references, beyond the age of Bracton. Dr. Jenks' *Short History of English Law*, a valuable one-volume survey of legal development from the earliest times to our own day, which embodies the results of much original investigation, professedly deals with the subject only in outline: and for its purposes and within its scope Dr. Jenks' book will not be displaced, one ventures to think, by more detailed works. The way has long been open, and it still is open, therefore, for the entry of Dr. Holdsworth's longer treatise. One not only awaits with keen pleasure the publication of his remaining volumes, all of which are now complete and ready in manuscript, but one hopes that in a future edition the learned author will continue the history from 1700 to the present day. Of the scholars of our own generation Dr. Holdsworth is best qualified to show us the outcome of the earlier development in the legal institutions of the period since 1700 and, at the same time, to explain the newer features of our system introduced in response to the changed conditions of modern social life.

The prospectus of the Vinerian Professor's complete *History of English Law* to 1700 gives one a clear idea of the vast scope of the work, a work which, in respect of its detailed and penetrating survey of English law as a whole, reminds one of the *Commentaries* written by the first holder of the Vinerian Chair. Both in their method of treatment and in their point of view there are, it is true, important differences between Blackstone's *Commentaries* and Holdsworth's *History* as contributions to our legal literature. The earlier work is a systematic treatise on the English law of the commentator's own day; historical evolution plays only a secondary—an explanatory—rôle. The later work is fundamentally an historical account of legal origins and of legal development throughout many periods, but within each period the matter is arranged systematically. In the earlier work the emphasis is naturally upon the modern system itself, while in the later one the main stress is of course upon the

historical foundations of that system. The two works possess, however, one particular feature in common. Each one is the result of the studies of a single scholar and of his purpose to view the English law as an entirety—as a legal system composed of many closely related parts. Each one of the two treatises is, in fact, institutional in character; each one of them surveys the rules and principles of the whole system of our law and not merely the rules and principles of certain of its special branches. In our present age of composite legal and historical works, works composed by many hands, such as Halsbury's *Laws of England*, the writing of an institutional treatise on the historical basis of our legal system by a single scholar is a notable achievement. Dr. Holdsworth has successfully accomplished for our own time a great task in legal authorship—an accomplishment which is comparable to the writing of the *Commentaries* by Blackstone in the second half of the eighteenth century. Blackstone's famous *Commentaries* filled a great gap in the legal literature of his day; and a similar gap in our own present-day literature of English law and history will now be filled by Dr. Holdsworth's lucid and comprehensive *History of English Law*. It is a pleasure, as well as a duty, to recognize the magnitude and importance of this work and to extend hearty felicitations to the learned author upon the completion of an enterprise which has involved so many years of laborious research.

The first volume of the work—the volume which now lies before us—deals with the history of the judicial system from the earliest times to the present day; and in its present form, this volume, revised and rewritten as it has been, is essentially a new book embodying the main results of recent researches by the author and other historical scholars. In the earlier chapters the author deals with the origins of the judicial system and with the decline of the old local Courts and the rise of the new County Courts. The third chapter is concerned with the system of common law jurisdiction. In the chapters which follow we have presented to us historical accounts of the House of Lords, the Court of Chancery, the Council, and the Courts of special jurisdiction, such as the Courts which have administered the maritime and commercial law and the ecclesiastical tribunals. In his final chapter, the author considers the reconstruction of the judicial system effected by the Judicature Acts of 1873 and 1875. The Appendix contains a useful collection of writs and other legal documents, as well as tables of officials of the Courts at different periods. In its present form this first volume is the most systematic account of the judicial part of English constitutional history which we possess; and it will be widely used both by students of the Constitution and by students of the law.

The reasons which have led the author to devote his first volume to a history of the Courts are admirably set forth in the introduction. "The rules which govern the jurisdiction and the procedure of the Courts," says Dr. Holdsworth, "are the substantive part of early bodies of law. As these Courts increase in power and enlarge their jurisdiction, the law which they apply gradually becomes more important than the Courts which administer it and the procedure by which it is administered. The law becomes the substantive part of the system; the procedure becomes merely adjective. But a body of law which has thus grown up bears upon it many marks of its origin . . . [The] English legal system has, throughout its history, maintained its connection with the Courts more closely than any other. This is due mainly to two causes. In the first

place, the different component parts of the English legal system have been developed at different periods in many different sets of Courts . . . [The] nature and extent of their contributions cannot be appreciated without some knowledge of the history of these different Courts. . . . In the second place, the main body of English legal doctrine has been and is still being made by the decisions of Courts. . . . [The] English judicial system is, so to speak, the skeleton round which the rules of English law have grown up; and the gradual evolution of the form of this skeleton has determined the large outstanding characteristics of the ever-growing body of English law. The history of the judicial system . . . will thus be a general introduction to the history of the law."

Dr. Holdsworth's reasoning will undoubtedly meet with the approval of most English and American lawyers and historians who are familiar with the main features of English legal development. But no doubt it will impress Continental legal historians as strange that the writer of a long and detailed history of a legal system should choose to fill his first volume with a history of the Courts throughout all the successive periods of development. In histories of Continental legal systems the Courts are usually given a place of less importance than that accorded to the legislative authorities, while the sections dealing with the Courts are generally distributed throughout the entire work under the appropriate periods of development; the matter dealing with the history of the Courts is not usually placed in one single part of a work on legal history, and never at the very beginning. The explanation of this striking difference between Dr. Holdsworth's method of dealing with the history of the Courts and the method followed by most Continental legal historians seems to lie in a fundamental contrast between the English and the Continental legal systems. On the continent the Roman codifications of Theodosius and Justinian have exercised a profound influence on the processes of legal growth as well as on the character of the law itself. The main features of the law have long been embodied in codes *iuxta exemplum Romanorum*; the law is largely the "written law" of the legislator and not the "unwritten law" of the Courts. In Continental countries the legislators have played the predominant rôle, overshadowing the Courts; the Courts have never been primary institutional factors in creating and shaping the law. In consequence of this fact that the law of most Continental countries is the enacted law of the codes, historians of those bodies of law naturally do not give the Courts the most prominent place in their writings. In contrast with Continental legal systems, English law is in most of its essential features a creation of the Courts and not of the Legislature; judge-made law has always played a greater rôle than the enacted law. To an English lawyer, therefore, the placing of the Courts in the forefront of a history of the law seems a perfectly natural method of treatment. The fact that Dr. Holdsworth employs judicial history as an introduction to the history of rules and principles will give the English lawyer no shock of surprise, for in large measure he is still accustomed to think in terms of Courts and writs and procedure.

In emphasizing the close connexion between judicial history and the history of the substantive law one ought not to lose sight of the fact that this connexion is only one aspect—although in England it is the most important aspect—of the broader relationship between institutional and legal history. Without an understanding of the evolution of the whole constitutional framework of the State—the legislative and executive

authorities as well as the Courts—the history of legal rules and principles will hardly be intelligible. Constitutional history and legal history are in fact most intimately related to each other; in one sense they are merely two aspects of one and the same process of evolution. In the first three volumes of his work, Dr. Holdsworth has given due consideration to this dual character of his subject, and one is confident that in the volumes dealing with the period from 1485 to 1700 he will show us with equal clearness the intimate relations between the history of the Constitution and the history of the law.

In the present volume Dr. Holdsworth throws new light upon many features of English judicial history. His account of the official staffs of the Courts is, for example, especially illuminating. Not the least of the contributions which he has made to this somewhat neglected subject is his explanation of the reasons for the long life of the idea that many of these offices were the freeholds or the properties of the officials. In reading this explanation, we see very clearly how both archaic and feudal ideas long persisted within this part of the judicial system as well as in other features of the Constitution and the law; and we also see how these older notions, thus surviving in later times, have a practical *raison d'être* in social and political life. In conclusion, it may be noted that when dealing with the prize jurisdiction of the Court of Admiralty, Dr. Holdsworth illumines historically the problem raised in the case of *The Zamora* [1916] 2 A. C. 77. Of the comments which Dr. Holdsworth makes upon this important decision of the Privy Council, one may single out several sentences. "This decision," declares the learned author, from the point of view of legal history, "settles a controversy which has a long history, and settles it in a manner which is not wholly consonant to the current of previous authority. . . . The judgment in the case of *The Zamora* is . . . correct in so far as it decides that an Order in Council which contravenes a statute or a principle of international law which has been accepted as a part of the common law, must be disregarded by a Prize Court. But I doubt very much," Dr. Holdsworth continues, "whether it is correct in deciding that such an Order can be disregarded if it contravenes a rule of international law which has not been incorporated into the common law. That there are many such rules, the case of *Reg. v. Keyn* (1877) 2 Ex. Div. 63, shows, and it is because the judgment in the case of *The Zamora* neglects this distinction that I doubt whether it is historically sound." Students of prize law will find it highly desirable to read the several pages which Professor Holdsworth devotes to this important problem in our legal history.

H. D. H.

[*Editor's Note.*—Volumes II. and III. of Professor Holdsworth's *History of English Law* have recently been published. They will be reviewed in the next number of the *Cambridge Law Journal*.]

A Guide to Diplomatic Practice. By SIR ERNEST SATOW.
Second and revised edition. Two vols. xx and 419 pp.;
x and 438 pp. Longmans. (42s. net.)

THE first edition of this work was completed towards the end of 1916, and since then much has passed in the diplomatic world. But the changes in practice have not been great, and some experiments have not proved entirely successful. For instance, the phrase "open covenants openly arrived at" struck pleasantly upon the ears of those who rather unaccountably identify democracy with publicity; but the author of the phrase—we do not yet know whether willingly or reluctantly—became a member of one of the most secret councils that have ever moulded the world's history; and when the phrase was interpreted to mean the substitution of necessarily hasty meetings of Prime Ministers, not trained to the work of negotiation, for the tried methods of the older diplomatists, it is almost universally conceded that, though the experiment may have been worth trying, it has not in fact been so successful as to justify its continuance; it is with some relief that the professionals are seen to be returning to the work on which they have spent their lives. Satow has not therefore had so much to modify as might have been expected. He has added short and useful accounts of the Peace Conference at Paris and the Disarmament Conference at Washington; he has remodelled his account of the office and functions of the Secretary of State for Foreign Affairs, and he has omitted, as now of no practical interest, a description of the ceremonial and precedence at the Court of Russia.¹

A worker who has used the first edition will not notice many other alterations. I suppose that in the course of my professional duties I use the book as much as any other man living; and as I was not fully satisfied with the index to the first edition, I asked the author to let me do the work on this occasion, and he kindly consented. The reader will find far fewer entries of a proper name followed by the reference without further elucidation, and on the other hand more entries of subject headings with detailed sub-headings. I think I have improved it for the diplomatist, but I hope I have not spoiled it for the historian!

This last egotistical sentence leads to the one misgiving which I have always had about this book ever since I first began to use it; I will not put it in the form of asking whether Satow is too much of an historian to write the perfect hand-book for diplomatists, but enquire whether he has not set before himself two almost incompatible ideals. Let me take parallels from other branches of knowledge; my friends tell me—I am not competent to judge—that economics and economic history are both great and good studies, but could scarcely be studied in the same volume: turning to ground that is more familiar to me, historical grammars are of the greatest interest and importance to specialists, but I should not like to teach a beginner from one, nor use one to acquire a new language myself. I even begin to entertain an uncomfortable doubt whether the practice of piety would be achieved by a study of the history of religion!

¹ I think I could have wished that he had also saved a good many pages (i.e., pp. 37-8, 42-9) by leaving out the long historical wrangle of successive Tsars in endeavouring, successfully in the end, to acquire the recognition of the title "Majesty" from their brother monarchs, or had at any rate relegated it to an appendix.

I do not mean that all references to the past can be kept out of diplomatic instructions; quite the contrary, for no science or art depends more upon precedent. But it would have been possible in this book to reduce the descriptive historical matter to a considerable extent, especially in the chapters on congresses and conferences, which take up just half the second volume, and yet to retain sufficient instructions and advice, in perhaps fifty pages instead of two hundred, to enable a diplomatist to attend profitably at either.

I have now made my single cavil, and it is not a serious one; the pleasant task remains to me of pointing out, by a brief description of its contents, the value of the book to workers in my field and fields allied to mine, whether their work is in practice or in theory. Satow begins with a note on the meaning of the word "diplomacy," and then discusses the immunities of heads of States, monarchical and republican. He then describes the office of Minister for Foreign Affairs in various countries, and soon comes to questions of precedence, both among States, heads of States, and agents. Next, the language of diplomatic intercourse and the forms of certain documents are discussed (could the ordinary man of culture define a *note verbale*, a re-credential or even a full-power?); and then comes a chapter, on "Counsels to diplomatists," which is of especial interest because the writer's personality is more evident in it than elsewhere: Satow gives his own advice—and very good sense it is—as well as that of the classical writers, such as Callières. This part of the work concludes with explanations of a few Latin and French phrases (e.g., *ad referendum*, *démarche*), which are the common coin of diplomacy.

The second half of the first volume is taken up with a consideration of diplomatic agents—their selection, classification, rights and immunities, both personal and affecting their staff and their residence, and the various formalities which attend the beginning and the termination of a mission. There are curious variations in international practice. All nations, for instance, ordinarily enquire of the country of destination whether the person designated as head of a mission will be acceptable there; except the United States, who make such enquiry about an ambassador, but not about any envoy of lower rank. Diplomatic immunity may provide some interesting extensions in the future. The position of the Secretariat of the League of Nations in the country of its residence presents some problems which have not, I believe—I am writing in Geneva—been finally solved, the most obviously difficult being those connected with the position of Swiss members of the Secretariat *vis-à-vis* the laws and taxes of their own country and canton. In the chapter on the right of legation,² I notice that Satow confines the right to recognized independent States, certain semi-sovereign States and the Holy See. To this it may be added that the right is also claimed by at least one Order, that of Malta, and I believe that an envoy extraordinary and minister plenipotentiary representing that Order is at present recognized in Budapest, if not elsewhere.

I have already alluded to the contents of the first half of the second volume, and I will here say no more than that the account of congresses and conferences is singularly careful and complete. Some of it is necessarily dull reading, being the bare bones of a series of sessions, commissions,

² *I.e.*, the right to send diplomatic agents to represent the sender's interests in other States.

and *procès-verbaux*; but it is matter hard enough to find elsewhere. We then come to a much more interesting topic, that of the various forms of international instruments, treaties, conventions, declarations, agreements, arrangements, &c., and their component parts. Many of these terms have been loosely applied in the past, and it is often hard to see the principle which makes a given compact between two or more nations take one form rather than another; but Satow guides us with a great degree of success, giving a few concrete examples of each kind. We then learn the meaning of some technical terms (*e.g.*, protocol, *procès-verbal*,³ *modus vivendi*, adhesion) used in connexion with such compacts; and the work concludes with a couple of excellent chapters on good offices and mediation—terms which have not always been distinguished clearly by some of even the greatest statesmen. In these two chapters Satow is again the historian rather than the diplomatist, but I am here inclined to think that no other treatment was possible. The account of our attempt—unsuccessful in the main—to mediate between Spain and her South American Colonies is a little long, but the more recent cases (*e.g.*, the good offices of President Roosevelt at the close of the Russo-Japanese war) are admirably treated.

The book concludes with a careful bibliography and a valuable list of works which would be useful to the members of the diplomatic service of any country, especially of Great Britain.

STEPHEN GASELEE.

Outlines of Historical Jurisprudence. By SIR PAUL VINOGRADOFF, F.B.A. Vol. II. "The Jurisprudence of the Greek City," x and 316 pp. Oxford University Press. (21s. net.)

AN eminent American scholar has lately uttered this *cri du cœur*: "Nothing could be more absurd than the traditional idea, which by some strange dispensation goes unchallenged, that the Greeks, who were originators, inventors, adepts in everything else, were as little children in matters of law." The writer of those words is now answered by this second volume of Professor Vinogradoff's *Historical Jurisprudence*. There is here presented with admirable lucidity a systematic account of the jurisprudence of the Greek city State in its most characteristic form, the democracy of the fourth century B.C. The orators and inscriptions of this period provide the facts, the political and ethical thinking of Aristotle the main source of interpretation. Both the evidence and the interpreting of principles call for great tact and acumen, and both these qualities are displayed in this work. The time is hardly ripe for a final and comprehensive treatment of the whole subject. Before that is possible there must be years of work on the legal papyri of Greek Egypt which reflect back light on the practice of Greek, especially Attic, law. New inscriptions—*e.g.*, further publications from Delos, may provide new material, and a second Mitteis may revalue with new knowledge the debt of the Roman Empire to the legal thought of the Greeks. As regards Attic law of the fourth

³ Much ambiguity has crept, by loose usage, into the meanings of these words. It is heartily to be desired that the use of these and other diplomatic technical terms should be standardized. As the matter is hardly worth an international conference, could not the League of Nations undertake the task?

century, the massive volumes of Beauchet and the subtle work of Lipsius mark stages on the road, and in this volume a further advance is recorded.

Sir Paul Vinogradoff has deliberately abstained from dealing with the activities of the early lawgivers or the rise of Greek law. What this volume offers is mainly analysis and interpretation of Greek law as an established fact, above all of Attic law. This second limitation may be justified in the present state of our knowledge, for here, as in almost every other region of thought, Athens was the school of Greece.

A prime difficulty in dealing with Greek jurisprudence is that the Greek orators regarded law as a good servant but a bad master. Isaeus may not quite deserve all the hard things which Mr. Wyse says of him, but it is not for want of trying. The apparent candour of Lysias, the fine style of Aeschines, the loftiness of Demosthenes, conceal an art which is desperately wicked. But the perplexities of the inquirer are not wholly due to the vices of the orators. The very virtues of Attic law, its simplicity, directness, and commonsense avoiding of formulas, make it easy for an advocate to do without systematic exposition. Attic law is so inwoven with Attic life that it takes a kind of protective colouring exasperating to the student. Also the convention of Attic pleading was to be as unprofessional as possible in tone. And, finally, many of the laws inserted in the text of speeches are no more than grammarians' deductions from the surrounding text.

In the search for underlying principles of philosophy Professor Vinogradoff uses Aristotle with great discrimination, but the philosopher is, as it were, writing jurisprudence by accident and, in any case, is not simply the resultant of Greek mass-thinking. So other evidence as to this must be brought in, and in the chapter on *The Concept of Law* many strands of thought are skilfully disentangled. Aristotle subdivides justice into general, distributive, and corrective, to adopt the traditional translation of these terms, with due apologies to Professor Burnet. Aristotle has in mind justice as an ethical concept, and the subdivision "distributive" justice is, perhaps, less salient in the legal practice of the Greek State than Professor Vinogradoff would allow. It is tempting to press this idea rather further than the evidence warrants. For instance, the author adduces (p. 52) the very doubtful passage in the *Politics* (II. 7, 1266b.) as evidence that Solon prohibited the accumulation of property in land. No doubt Aristotle knew just what he meant to say, but the knowledge has died with him. On the next page three speeches of Lysias (XVI., XXVI., and XXXI.) are cited as making it clear that there was a general *διανομή* of offices at Athens carried out by means of the *dokimasia*. This is to misunderstand the nature of that institution, which is not to secure that citizens get the offices they deserve, but simply that they are qualified to hold office (see *Ath. Pol.* 55). Lysias is concerned with prejudice rather than law.

Aristotle adds under the general notion of justice "fairness" (*ἐπιείκεια*), and this is dealt with in a most interesting section. The extent to which the democratic Courts overrode the letter of the law is hard to estimate. Arguments from the orators which seem promising in this respect often prove to be addressed to arousing prejudice on points of fact. Thus Sir Paul Vinogradoff adduces Isaeus IV. § 12 "as a general remark of great weight. He [Isaeus] says that in trials concerning inheritance it is much more important to give heed to circumstantial evidence than to statements of witnesses; because the principal witnesses are generally either dead or—if the will has been made abroad—absent, and therefore not amenable to

cross-examination: their depositions have to be taken as they stand, and strict standards of criticism cannot be applied." This is not an appeal to equity; it is a standard rhetorical device (see Aristotle, *Rhetoric*, I., 15, 1376a., 17ff.), and its object is to suggest to the jury that the will in question may be forged—i.e., it is a question of fact that is concerned. When Isaeus is briefed to defend a will, his language is far different. But in general it is true, as Professor Vinogradoff points out, that the Athenian Courts were ready to seize any means of varying the law of inheritance in hard cases. But hard cases do make bad law in other countries too.

On the topic of the sources of law it is possible that the author over-estimates the force of custom, as distinct from written law. On this it is very easy to hold differing opinions. But the passages which refer to the written laws which bound the Areopagus are too many to make it easy to accept Professor Vinogradoff's view that that Court was guided in its decisions by customs not put down in writing and not enacted by the people, but preserved by traditional jurisprudence as τὰ πάτρια, ancestral custom. The inscription C.I.A.1.61 is presumably the rewriting of part of an old elaborate written code. So, too, the evidence for a body of true jurisconsults at Athens is really rather slight. The ordinary Greek jurymen is referred very constantly to the written laws of the city, and these are regarded as intelligible except for some old laws discussed in a speech of Lysias. The scope and variety of laws attributed, with whatever justice, to Solon do suggest that written law covered a very great part of the field.

Professor Vinogradoff next examines the structure of the city, the relation of citizens to city, and the law of the constitution. These chapters are most valuable both to the student of law and the student of constitutions. Here and there a reader might wish that the author had oftener transgressed his self-imposed limit and treated with like power and lucidity of the more aristocratic form of States. Here the brilliant writings of Keil and Swoboda have cleared up many dark places, but there is all too little in English on this theme. The author points out with force how much Greek law was common to different Greek communities, and he describes the chief legal relations between cities. The chapter is perhaps too short, but it would be ungrateful to clamour for more where so much is given. The chapter on Crime and Tort is admirable, and so is that on Property and Possession. In this last chapter, however, there is room for disagreement. Professor Vinogradoff lays great stress on the public element in property, more stress than the evidence may warrant. He assumes for the time immediately before Solon the inalienability of landed property in Attica (p. 210), and describes the economic crisis of Solon's times in a way which cannot be reconciled with the ancient evidence. The view taken by Professor Vinogradoff certainly raises as many difficulties as it avoids, as may be seen when he comes to deal with the institution of *hypotheca*, which is most naturally explained on the quite reasonable assumption that the ancient rigidity about the κλήρος no longer prevailed in Attica at the beginning of the sixth century. On the other hand, the author's handling of the difficult problem of the scope of the δίκη ἐξούλης is masterly, and marks a definite advance. In the last chapter, that on Conventions and Transactions, the writer both interprets early practice and adduces evidence from outside Attica, and succeeds in presenting a most lucid and interesting account of this side of Greek jurisprudence.

Where so much is of necessity disputable, no two students of Greek law

could agree in accepting quite the same evaluation of evidence, and a tribute of vague admiration would be no compliment to so eminent a scholar as the author of this book; but no student can fail to appreciate and be grateful for this work, which shows a rare combination of ingenuity and sanity of judgment. The author has not spared himself the trouble of a useful bibliography and an admirable index.

There are a few points of detail which hardly affect the general contentions of the book, in which a second edition might make alterations. On p. 80 the reference to Isaeus XI. is not enough to support the point without adducing [Demosthenes] XLIII. 7ff. On p. 146 the statement is made that at Athens the principal magistrates who had to act in law were regularly helped by legal advisers (*συνήγοροι*). The *συνήγοροι* were advocates specially appointed to represent the State in State trials, and only appeared regularly—probably with a watching brief—in the Court of the logistae (Ath. Pol. 54). That the *πάρεδροι* of the three chief archons or the *σύμβουλοι* of the Thesmobetae were legal advisers is far from certain. On the same page Calhoun's brilliant paper on Athenian Magistrates and Special Pleas (Class. Phil. XIV. p. 338ff.) might be taken into account. So, too, in the section on punishment, the discussion of *ἀτιμία* is incomplete without a reference to Swoboda's articles and Usteri's *Aechtung und Verbannung im griechischen Recht*. On p. 191 the reference to Isaeus VI. as evidence for the practice of selling as slaves foreigners who posed as citizens is a slip. The speech contains nothing about this subject. Isaeus III. 37 would be more to the point. The treatment of *φανερὰ* and *ἀφανὴς οὐσία* might be more elaborate. Professor Vinogradoff seems to exclude money from the class of *φανερὰ οὐσία*, and this is probably right. But in Demosthenes XLVIII. 12, to which he refers, *φανερὸς* appears to be used of money. The translation or paraphrase of Isaeus VIII. § 35, on p. 199, is misleading, as will be seen by reference to the text. In particular the author seems to misunderstand the meaning of *εὐρίσκουσιν*. On p. 203, in the sentence "after the conquest of Lemnos 3,000 lots were formed, of which 300 were to be dedicated to the gods," we seem to have the telescoping of two statements, one about Lemnos and one about Lesbos. Two pages later the statement, perhaps the overstatement, that "the historians and orators of the fourth century tell us repeatedly that the people in its impoverished condition had recourse to confiscations and expropriations which were not justified in law," is ill-supported by the single reference "Xenophon Resp. Ath.," as this work is not by Xenophon and was written in the fifth century. Professor Vinogradoff is of course aware of these facts (see p. 10), and also, no doubt, of the fact that the only statement in the work about confiscations, as distinct from the imposition of public burdens (I. § 14), refers not to Athens but to the subject allies of Athens. So here a correction seems needed. On the same page n. 4. Dem. XXXVII. § 19 does not strictly prove his point, while Dem. XXIV. § 54 does.

F. E. A.

Essays in the Law. By the Right Hon. SIR FRÉDÉRIC POLLOCK, Bart. London: Macmillan & Co., Lim. 1922. (12s. 6d. net.)

ONE of the many bibliographical difficulties that swarm round the legal student is the lack of adequate guides to the matter in professional periodicals. They generally include annual summaries of the titles of the separate articles in them, and these summaries may be gathered together in a sheaf every four or five years without approaching one whit nearer to an index than do the summaries themselves. It is thus possible to overlook valuable exposition of some point in an article because its general title does not suggest its details. Nay, it is possible even to miss the article itself without being guilty of wicked negligence, for it may not occur to the seeker to look for it in the particular journal which contains it. Some of us may be pardoned for not keeping an earnest watch on the *Cornhill Magazine* or the *Proceedings of the British Academy* on the off-chance of finding legal literature in these periodicals. Hence, any collection of essays into book form will at least put the researcher on his inquiry as to their existence, and will make them more easily accessible to the student in general.

We heartily welcome this volume comprising thirteen papers which Sir Frederick Pollock has published at various dates in the last thirty years. They cover a good deal of ground from subjects as sweeping as the history of comparative jurisprudence and the history of the law of nature to more technical topics like gifts of chattels without delivery and the modern doctrine of divorce. Most of them will interest laymen as well as lawyers. The paper on "Lay Fallacies in the Law" ought to be read by everyone before he speaks ill of the law. Study of it should prevent a quantity of stupid censure of our legal system for not doing what it never has professed to do, and would help to dispel the lay belief that all law is "so absurd that no statement whatever about it is too absurd to be credible."

The learned author makes it clear in the essay on the fiction theory of corporations that the common law has still a free hand as to whether it will adopt this, or the "realist," theory. His own preference is for the latter. If we confess ourselves still heretics we hope that we are neither obstinate nor relapsed ones. The lecture on judicial records has a delightful dialogue between Bracton and a twentieth-century guide, and in the succeeding paper on English law reporting, Sir Frederick speaks from the editorial chair of the mode in which the chief series of English reports is produced; he rejoices us in a footnote (p. 253) with a parody of pleading entirely worthy of the author of *Leading Cases done into English*. In the last paper, there is a quotation from the eccentric Serjeant Arabin which pulls the "reasonable man" from his seat on the Clapham omnibus and substitutes this remarkable test: "No man is fit to be a cheesemonger, who cannot guess the length of a street."

The essays are one more proof not only of their writer's many qualities, which it would be mere impertinence to mention, but, in particular, of his enviable versatility. Taken together with his *Oxford Lectures* published some thirty years ago, we should like to regard them as an instalment of "collected papers" to be placed on our shelves side by side with those of his famous colleague.

P. H. W.

Statutes and their Interpretation in the First Half of the Fourteenth Century. By THEODORE F. T. PLUCKNETT (Cambridge Studies in English Legal History). Cambridge: At the University Press. 1922. (20s. net.)

MR. PLUCKNETT'S contribution to the Cambridge Studies in English Legal History not only exhibits thorough scholarship, sound judgment, and skilful arrangement, but also establishes important results. The learned editor of the series, Professor Hazeltine, is to be congratulated on his selection for it of a piece of work of great assistance to researchers in our mediaeval law, and his own Introduction is in itself an illuminating guide to the topic both for the era which precedes Mr. Plucknett's period and for that which succeeds it.

The author's acute investigation of the interpretation of statutes is his main theme, but, as incidental to this, he has made several other points which will stand the legal bibliographer in good stead. One of these relates to the Record Commission's edition of *Statutes of the Realm*. Some years ago it fell to our lot to make a close, though narrow, study of some of the statutes in the first volume of this series, and we found it impossible to stifle a suspicion that, good as the Record Commission's work was in the light of what had gone before, it fell short of perfection. Mr. Plucknett has turned this suspicion into a certainty. The editors did not always adhere to the official sources as against the unofficial, they made mistakes about the dates of statutes, and they blundered in translation. This causes a feeling of insecurity that is very disquieting. The researcher is the person chiefly affected, for he will be taking risks if he relies for his early statutes on the Record Commission's version without verifying it by reference once again to the unprinted sources—a tedious and wasteful business when he wishes to use them only as ancillary to his main purpose. But the matter does not stop there. It may also affect the practitioner. The Interpretation Act, 1889, made the Commissioners' edition authoritative with respect to statutes cited in Acts of Parliament passed subsequently to the Interpretation Act itself. One conjures up the embarrassing spectacle of a Court at the present day pronouncing for the validity of a clause in an old statute, the text of which, though taken from *Statutes of the Realm*, has been proved by independent unofficial examination to be a *stultiloquium* on some material point. The possibility may be a remote one, at least as to the earliest enactments, because successive Statute Law Revision Acts have made historical matter of many of them; but it is still a possibility. Mr. Plucknett has also shown that the translations of the Year Books in the Rolls and Selden Society series, though reliable for general purposes, cannot be taken as canonical until a good deal more is known of law-French.

The early legal enactment was sufficiently protean, if anything so amorphous can be discerned as having any shape at all. It might be like a grant of lands, a treaty of peace, a proclamation of successful revolutionaries, an amicable agreement, or a writ to the judges, precisely because it might spring from a bargain with the King, a fight against the King, a deposition of the King, or an order by the King. The very language in which it was couched was unsettled, and its preamble was scarcely distinguished in interpretation from its purview. Much of this apparent confusion was due to the fact that constitutional functions which have

long been clear-cut to us shaded off into each other in the early fourteenth century. There is a case in Edward III.'s reign, *Staunton v. Staunton*, which illustrates to a nicety the contemporary vagueness (or even lack) of thought about the organs for law-making and law-administration. The way in which it was handled strikes the modern eye as an exhibition of "how not to do it" by three or four Government departments, not one of which is able to get its decisions agreed to promptly by the others, and some of which are incapable of reaching any decision at all; and constantly officials of one department have a finger in the pie of other departments. In short, if the student is to make any headway with the fourteenth-century statute, he will do well to clear his head of all technical conceptions now current of this species of law. We know of no book that will help him better to get the proper historical setting than this one. And any reader of it who is beginning to study English legal history will find here a stimulus to research in half-a-dozen directions.

It is worth while adding that the learned author's inference that *statutum* might occasionally mean a series of separate enactments grouped under one title (e.g., the Statute of Westminster II.) may be put in a slightly different form by saying that this indicated all the Acts passed in one session.

The indices are excellent, and the very few slips in printing which we have detected (e.g., "De custodiis" and "Prerogative Regis") are trivial and capable of instantaneous correction by the reader.

P. H. W.

Lehrbuch der Rechtsphilosophie. By JOSEF KOHLER. Third edition (revised), by DR. ARTHUR KOHLER. Berlin-Grunewald: Dr. Walter Rothschild. 1923. xxiv and 300 pp.

THE death of Josef Kohler in 1919 meant the passing of one who, in Professor Roscoe Pound's words, "came nearer than anyone else in modern times to taking all law for his province." In his *Interpretations of Legal History* (1923), Professor Pound has given a critical and sympathetic estimate of Kohler's contribution to one of the several subjects in which he was interested—the philosophy of law: and the readers of his book will not forget the high place which Professor Pound accords to Kohler within this important province of thought.

The most fruitful of Kohler's ideas in legal philosophy are contained in his *Lehrbuch der Rechtsphilosophie*. The first edition of this work appeared in 1908, the second in 1917. Kohler's son—Dr. Arthur Kohler—assisted him in some of his researches, and always stood close beside him in the development of his thought and in his outlook upon the problems of the philosophy of law. It is fortunate, therefore, that the one who best of all knew Kohler's mind in its latest phase—the phase of legal philosophy—should be the editor of this new edition. With scrupulous piety Dr. Kohler has preserved his father's text intact. His own editorial work has been, on the whole, of a formal character, alterations of a substantive nature being effected on the basis of adherence to his father's own written or spoken words. The book is still, therefore, Josef Kohler's own: and in this new form it will continue to hold its high rank among those works on legal philosophy which have new and creative tendencies. Embodied in this book are many of the results of Kohler's life-long study of primitive

customs and systems of civilized law. His intellectual survey embraced not only the entire legal evolution of historic times, but also the many schools of juristic thought from antiquity to the present day. His book reflects this vast compass of the ages.

Of Kohler's ideas we must not speak in detail. It will suffice to remark that his main position is that of a Neo-Hegelian social-philosophical jurist; and that, from this standpoint, he has enriched juridical thought, turning the minds of men into new and fruitful lines of thought and research. His work will be for some of his disciples the final judgment; while for others it will be but as one of the main stepping-stones to a realm of juristic speculation all their own—or, rather, to a realm of juristic speculation in which Kohler's concepts are of persuasive but not of binding authority. Both of these classes of disciples, and, indeed, jurists who differ fundamentally from Kohler's standpoint and who can in no sense be regarded as his followers, will all unite in the recognition of the amazing fertility of Kohler's genius. In the minds of thousands of students in all parts of the world who knew Kohler in the days of his Berlin professorship (1888—1919) thoughts will arise, too, which are but slightly related to judgments as to the soundness of the teacher's views of legal philosophy. They will recall his striking figure—the massive head, the long iron-grey locks falling in a tangle on the broad shoulders, the kindly penetrating eyes, the ambling gait, the *Mappe* of lecture-notes held firmly under the arm. Many will remember their friendly talks with him, interrupting for a time, perhaps late at night in his study, the almost incessant toil at researches which ranged over the whole field of the law. Nor will a few of them forget that they have seen the strange—almost bizarre—figure of the great scholar seated at his favourite table in his favourite café lost to his surroundings in the writing of his poems; for the author of the *Lehrbuch der Rechtsphilosophie*, *Shakespeare vor dem Forum der Jurisprudenz*, and a mass of other writings on topics legal, had a mind for verse as well as for the staid and sober prose of the jurist. Kohler had a poet's fancy. It was that same fancy—the imaginative faculty of the poetic artist—which led him into untrodden paths within the vast domain of legal institutions: without it, he would never have been a pioneer in more than one field of legal research and speculation. Poetic fancy has its uses in all ages in training the mind of the jurist to look for the hidden or half-hidden truths that lie behind texts. It had its uses in the case of Selden and of many another great jurist of the past. It has its uses in the study of the jurisprudential problems of to-day.

H. D. H.

Stephen's Commentaries. Seventeenth edition. General Editor, EDWARD JENKS, M.A., D.C.L.; Vol. I., *Public Law*, by P. A. LANDON, M.A., M.C.; Vol. II., *Law of Property*, by EDWARD JENKS; Vol. III., *Obligations and Civil Procedure*, by ARNOLD D. MCNAIR, M.A., LL.M., C.B.E.; Vol. IV., *Crimes and Criminal Procedure*, by V. R. M. GATTIE, M.A., C.B.E. Published by Butterworth & Co. (£6 6s.)

It is not for us to appraise the wisdom which decrees that articled clerks shall be examined within the first year or two of their apprenticeship upon the whole field of English law. Granted that policy, it is difficult to see

what other work than *Stephen's Commentaries* could be prescribed for them; and, granted that book, we consider that the General Editor and his colleagues have produced as good a revision as is possible in the difficult circumstances of their task. The policy of pouring new wine into Blackstonian bottles which has prevailed for a century and a half, firstly in the successive editions of the original *Commentaries* and since 1841 in those of Stephen, had already become an absurdity; and the spectacle of chunks of the sacred text sandwiched, with the aid of square brackets, between passages written in the racier styles of the nineteenth and twentieth centuries has long been both incongruous and indecorous. "*Blackstone*" is a classic, and should now be edited as such without any attempt, however reverent, at modernization. Fortunately on this occasion the General Editor and his colleagues appear to have stipulated for a free hand, and have to a very large extent rewritten the work. The result is an edition very superior, in our opinion, to any of its predecessors.

As illustrations of new or improved features, the following may be mentioned. Volume I., after a new Introduction of nearly 100 pages by the General Editor, in which the student is told in simple language what it is all about and what the sources of his materials are, gives us under the title of Public Law an excellent introduction to the constitutional and public law of this country. In turn it deals with the British Empire, the Legislature, the Executive, the Royal Prerogative, the Revenue, the Church, Corporations, Family Law (Husband and Wife, Parent and Child, Guardian and Ward), Local Government, Education, Poor Law, Ways and Communications, Licensing Laws, Public Health, and the Legal Profession. To give an elementary survey of such a motley collection of topics which is readable and does not degenerate into a mere catalogue is not an easy task, and Mr. Landon is to be congratulated on his performance of it.

Volume II., by the General Editor, contains, in addition to its main topic—Real Property, dealt with in 500 pages—seven chapters on the elements of the law of Personal Property, and two chapters on the law common to all kinds of property. A perusal of the volume makes us regret once more that the Editor's *Modern Land Law*, published in 1899, has seen no later edition.

In Volume III. the law of Contracts, which used to figure as "Title by Contract" (one of the least important aspects of the law of Contracts), now receives 269 pages instead of 162, and the law of Torts receives 136 instead of 30 in the last edition, where it appeared as a part of the machinery of civil procedure.

Volume IV., about which the archaic flavour has always seemed to us to cling with peculiar affection, has been brought thoroughly up to date by a practising member of the Bar acquainted with criminal law and procedure, and the concluding chapter on The Rise, Progress, and Development of the Laws of England has been entirely rewritten by the General Editor.

From the point of view of law teaching in Cambridge, Volumes I. and II. have a very real value. We suppose Messrs. Butterworth & Co. have good reasons for not selling the volumes separately, but we deplore a policy which prevents a student who is not a candidate for the Solicitors' Intermediate Examination from acquiring one or two volumes without being saddled with the rest.

The printing and binding and general "get-up" of the volumes are

good, though we have heard some complaints that it has not been possible (doubtless on grounds of space) to give each volume a separate index.

Digest of Stephen's Commentaries. By EDGAR HAMMOND, B.A.
Stevens & Sons, Lim. (10s.)

MR. HAMMOND has compiled a Digest of the recent edition of *Stephen's Commentaries* as an aid to students doomed to sit for the Solicitors' Intermediate Examination. Mr. Hammond says in his Preface that "in the case of one or two matters which seemed to be obvious errors or omissions [in Stephen], I have done my best to improve upon the original." We shall select a few of these attempts for comment.

(i) Why should it be stated on p. 17 that "In *Stockdale v. Hansard*, in 1839, the Commons ordered their printer, Hansard, to publish a particular debate"? The libellous document in question was in fact an official report by two of H.M. Inspectors of Prisons.

(ii) On p. 83 we find as one of the essentials "for dower to arise" that "... issue capable of inheriting though not yet born, if born must be capable of inheriting (therefore no dower out of an estate in special entail on a former wife)," which is puzzling. Surely Dr. Jenks' statement in the *Commentaries* (Vol. II. p. 74) is simpler: "and of which any issue, which she might have had, might by possibility have been heir," and need not have been improved.

(iii) On p. 232 we are told by Mr. Hammond that "in *Carter v. Boehm* A insured a ship with B for a voyage not knowing that the ship had already reached its destination. B knew of this fact, but concealed his knowledge. A was therefore able to avoid the contract." In sober truth, the thing insured was Fort Marlborough in Sumatra, and the underwriter was unsuccessful in seeking to avoid the policy on the ground of concealment of certain information as to the weakness of the defences of the port. But most Intermediate students are familiar with *Shirley's Leading Cases*, and will remember *Carter v. Boehm* there.

(iv) On p. 261 we are told by Mr. Hammond that "a private person may arrest any person who he has reason to believe has committed a felony, provided that a felony has in fact been committed." Thus the whole point of *Walters v. W. H. Smith & Son*, and of the underlining of the words "the particular felony" in the text of the *Commentaries*, is missed.

Nor (v) is the statement, on p. 262, that "an action for slander must be brought within six years of the accrual of the damage" accurate, since for slander actionable *per se* the period is two years from the date of publication; and the statement on p. 300 that "A husband can obtain a divorce if his wife has been guilty of adultery *alone*" (italics ours) is cryptic and seems to have lost something by compression. But instances of inaccuracy need not be multiplied, and there are many misprints which careful proof-reading would have detected.

The fact is that *Stephen's Commentaries* are themselves a compression, and any attempt to "pot" them into three hundred and fifty-two pages is a task requiring a considerable amount of skill and meticulous accuracy. Mr. Hammond's attempt at this task has evidently suffered from undue haste in the accomplishment of it.

A. D. McN.

Constitutional Law of England. By E. W. RIDGES. Third edition, by SYDNEY E. WILLIAMS. Stevens & Sons, Lim. 1922. (Price £1 net.)

THIS edition of Mr. Ridges' work on Constitutional Law appears to us to be a considerable advance on the two previous editions, and should prove very useful to students of the subject. It appears still to retain some faults of its predecessors, particularly a certain lack of perspective. A whole chapter (Chapter V., pp. 93—136), is devoted to details of the Public Revenue, while the discussion of the general principles governing our financial arrangements is compressed within the limits of four pages. The account of the American Commonwealth and the Swiss Confederation and the discussion of Imperial Federation appear to be out of place in a work dealing specifically with English constitutional law, and the same criticism may be made of a few other portions of the book.

The editor does not appear to have had any of the doubts which assailed some members of the Lords' Committee on Privileges in *Lady Rhondda's Case* as to the effect of the Sex Disqualification Removal Act, 1919, for he allows the statement "A peeress in her own right cannot sit in the Lords" to stand without comment. On p. 75, in connexion with the *Devon and Wiltshire Peerage Cases*, reference should have been made to the *Buckhurst Case*. On p. 106 the question decided in *Bowles v. Bank of England* [1913] 1 Ch. 57 is stated to be doubtful, and no reference is made to the Provisional Collection of Taxes Act, 1913.

These, however, are small blemishes in a treatise of so extensive a nature as that under review, and, in our opinion, the editor has carried out his difficult task with much success, and has much enhanced the value of this work as a text-book.

D. T. O.

A Digest of the Law of England with reference to the Conflict of Laws. Third edition, by A. V. DICEY, K.C., Hon. D.C.L., and A. BERRIE DALE KEITH, D.C.L., D.Litt. Stevens & Sons, Lim., and Sweet & Maxwell, Lim. 1922. (Price £2 5s. net.)

A Treatise on Private International Law. By the late JOHN WESTLAKE, K.C., LL.D. Sixth edition, by NORMAN BENTWICH. Sweet & Maxwell, Lim. 1922. (27s. 6d. net.)

BOTH of these books have acquired such high repute as almost to bring them within the select circle of those great works on English law which the Courts receive as authoritative. In particular, Professor Westlake's treatise has exercised a powerful influence on the rapid development, during the latter half of the last century, of the department of law with which it deals.

These two works supplement each other. Professor Dicey's work is an accurate presentment of the present rules on the subject in a codified form amply illustrated by examples drawn, where possible, from actual decisions of the Courts. Professor Westlake's work, on the other hand, contains a

full discussion of the subject both historically and comparatively, as well as an exposition of the principles followed by English Courts.

Owing to the lamented deaths of both the distinguished authors since the last editions of these books were issued, the present editions have been completed in the one case by Sir Berriedale Keith, and in the other by Mr. Norman Bentwich. The mantle of the masters could not have fallen on more competent shoulders, and it is hardly necessary to say that the new editions maintain the high standard of accuracy and scholarship associated with these great works.

D. T. O.

The Spirit of Our Laws. By HERMAN COHEN. Second edition. Cambridge: W. Heffer & Sons, Lim. 1922. (Price 9s.)

THIS is a book which everyone beginning the study of English law should mark, learn and inwardly digest. It describes the practical working of our legal system in a clear and readable manner and with a wealth of illustration drawn from the author's large experience and wide range of reading. It is commendably free from technicalities and written in language which may be "understood by the people," so that the work cannot fail to be of unique value, not only to "commencing lawyers," but to the lay public who take an intelligent interest in the proceedings of the Courts of Justice. It is interesting to find two quotations from the *Cambridge Law Journal* (on p. 14, note, and pp. 182-3). We have noticed two printer's errors, one on p. 17 and the other on p. 226. We leave it to the diligent reader to discover them.

D. T. O.

A Concise Explanation of Lord Birkenhead's Act (The Law of Property Act, 1922), in plain language. By SIR ARTHUR UNDERHILL, LL.D. Butterworth & Co. (Price 10s. 6d.)

ANY work from the pen of Sir Arthur Underhill on the subject of the Law of Property Act must necessarily be received with gratitude by members of the legal profession. For whatever may be the view of any individual as to the merits of this Act, there are no two opinions as to the disinterestedness and public spirit with which Sir Arthur Underhill and Sir Benjamin Cherry have shouldered the heavy labour of attempting to simplify the English law of Real Property. And it is obvious that there can be few who have so intimate a knowledge of the details of the provisions and their probable working as these two eminent lawyers.

The book is founded on a course of lectures delivered at the request of the Council of Legal Education. This fact is to be regretted, for in the case of a subject of this sort any traces of the form and language of oral exposition must necessarily alienate a certain number of readers, while it may be doubted whether they are of real assistance to any.

If the style of the first chapter were modified, and if it were purged of certain incursions into the realm of jurisprudence which must necessarily be superficial, it would be as perfect an exposition of the present law of Real Property as can be presented in so limited a space. Whether the criticisms indicated are justified or not, it can be warmly recommended

to a student who, having spent some time mastering the separate rules of Real Property law, desires to obtain a view in perspective of the system into which they are woven.

The remaining two chapters are a very convenient summary of the principal alterations made by the Act. The only scope for individuality in the performance of a task of this sort lies in selection and clearness of statement, and Sir Arthur Underhill's summary, of course, possesses both these merits.

The explanatory comment which will be of greatest interest to the academic student is one which the author has also made elsewhere, on the subject of tenancies in common. "Tenancy in common, where it exists, is," he writes, "a far worse impediment to free trade in land than settlements are. The writer did not fully realise this until he became one of the conveyancing counsel of the Court, on whom the duty falls of examining the various titles of tenants in common where property is the subject of an action for partition or sale. It is by no means uncommon to find the equitable title split up into fifty or sixty undivided shares, most of them mortgaged, and some of them settled, and the elusive legal estates so hidden as to be almost beyond the wit of man to discover. Where this is the case, nothing less than an action will suffice to cut the Gordian knot, and when (as frequently happens) the property is small—a few houses or a small farm—the costs of the necessary enquiries leave little to be divided between the unfortunate co-owners."

If the practical operation of tenancies in common was not realized by the distinguished author until he had reached a comparatively advanced stage in his career, how still less enlightened on the subject must be the academic student of the law. For the charge may reasonably be brought against the leading Real Property text-books that obscure doctrines of rare application often receive more exposition and illustration than fundamental propositions of universal import, and that even an intelligent reader, at the end of a conscientious study, is puzzled as to where the centre of gravity of the subject lies.

The fact that the Act has been publicly heralded by Sir Arthur Underhill as Lord Birkenhead's Act, will probably cause it to go down to history under that name. In the preface a well-merited tribute is paid to the ex-Chancellor as a legislative obstetrician, but it is probably an innovation—perhaps not a bad one—for services of that kind to be recognized at the christening.

H. A. H.

Notes on Perusing Titles. Tenth edition, by LEWIS E. EMMET.
The Solicitors' Law Stationery Society, Lim. (Price 40s.)

A Guide to the Law of Property Act, 1922. By W. E. WILKINSON, LL.D. (Price 5s.)

A Short Epitome of and Guide to the Law of Property Act, 1922. By G. N. MARCY and R. R. FORMOY. Sweet & Maxwell, Lim., and Stevens & Sons, Lim. (8s. 6d. net.)

THE Law of Property Act will profoundly affect the lives of many men. It will shorten those of middle-aged solicitors, who will have to go back

to school, and of teachers, who will have to exhaust themselves still more than at present in entreating the incredulous student to realize that he cannot know the new law without mastering the old. It will lengthen those of Lincoln's Inn barristers, who will be revived by the disappearance of the haunting spectre of unemployment during the rest of their lifetime. It will be cursed in the homes of editors spending sleepless nights in the thankless and unremunerative task of pouring the new wine into the old text-book bottle.

To whichever class of persons mentioned we belong, we should regard ourselves as indebted to lawyers like Mr. Emmet, Dr. Wilkinson, Mr. Marcy, and Mr. Formoy, who have put into print the result of their preliminary work in digesting the new provisions.* The guides written by Dr. Wilkinson and by Messrs. Marcy and Formoy will be found useful by students who either desire a preliminary survey of the provisions of the Act or, having studied them in detail, require a means of ready reference to them. Epitomes in general are dangerous things, but in the circumstances of this particular piece of legislation they are almost a necessity.

The tenth edition of Mr. Emmet's well-known *Notes on Perusing Titles* is a really valuable contribution to the needs of lawyers of every kind. Mr. Emmet is first in the field, and he and his publishers fully deserve the advantage which their promptness will give them. As a first step towards practice under the new law, no solicitor or articled clerk could do better than make a careful study of this book. There is an introduction of about twenty pages, containing suggestions which will be useful to the more inexperienced student, and an epitome of the new Act.

Mr. Emmet has retained the old title of his book, because he does not profess to have written a complete treatise on conveyancing, but has confined himself to those matters with which experience has shown that solicitors are most frequently concerned. Following this principle, he has omitted from this edition reference to some parts of the Act, such as those relating to the rights of the public over waste lands and commons. He also does not deal with Land Registry practice. The method adopted of placing a line in the margin by the side of passages containing statements of the law introduced by the new Act, will be found very helpful.

H. A. H.

The Principles of the Law of Evidence. By W. M. BEST.
Twelfth edition, by SIDNEY L. PHIPSON. London: Sweet & Maxwell, Lim. 1922. (£1 12s. 6d. net.)

It is more than seventy years since the first edition of this book appeared. In his preface, the author emphasized the purpose of the work as the examination of the principles on which the rules of evidence are founded, and not the addition of one more volume to practitioners' books. The popularity of *Best on Evidence* is a proof of a creditable desire on the part of lawyers and some laymen to absorb their knowledge from sources which are something more than useful digests of the law. Mr. Phipson has faithfully adhered to his author's scheme. The reader must not expect to find references to all cases, important and unimportant. If we go by the *Law Reports Digests*, 1901—1920, there are some thirty cases under the

heading "Evidence." Three only of these are indexed in *Best*, and Mr. Phipson has acquitted himself well of the task of deciding what should be omitted in a general exposition of principle. The book will always interest the scholar, whether he be a lawyer or not.

P. H. W.

Cases on Labor Law. By F. B. SAYRE, LL.B., S.J.D., Assistant Professor of Law in Harvard University. Published at the Harvard University Press. (25s. net.)

WE are accustomed to expect a high standard, both as to form and as to content, in the case-books emanating from the Law Faculties of American Universities, and Mr. Sayre's *Cases on Labor Law* does not disappoint that well-founded expectation. It is an admirable collection (in one thousand pages) of American and English decisions and statutes bearing upon the history and present legal position of labour questions. It is doubtless primarily intended for classes of advanced students of law, but any English reader wishing to follow the parallel handling by American Judges and legislators of problems which are also familiar in this country will find here just the material he requires. And the English practising lawyer engaged in trade union and similar cases will be spared many a long search among the American authorities if he accepts the guidance of this book.

Among the topics dealt with are the following:—Legality of Combination, including Conspiracy (we are a little surprised not to find McCardie, J.'s valuable judgment in *Pratt v. British Medical Association* [1919] 1 K. B. 244, mentioned); Inducing Breach of Contract, Peaceful Persuasion, and Picketing; the Legality of Ends pursued through Collective Action, *e.g.*, to secure higher wages, shorter hours, or the unionization of shops; Boycotts; the Status and legal responsibility of Trade Unions; a chapter on regulating legislation, *e.g.*, Factory Laws, Minimum Wage Laws; a chapter on Compulsory Arbitration; and a chapter on Workmen's Compensation. Mr. Sayre prints sections 3 and 7 of the British Conspiracy and Protection of Property Act, 1875. May we suggest for the next edition that he should consider the addition of section 4 of the same Act, making punishable as criminal offences certain breaches of contract by persons employed in connexion with the supply of gas and water (and electricity by section 31 of the Electricity (Supply) Act, 1919), and section 5, which does the same in the case of breaches of contract of which the probable consequences will be the endangering of human life or the destruction or serious injury of valuable property?

A short Appendix deals with a matter of great interest to the citizen and to the student of economics—minimum of subsistence and minimum-comfort budgets, based upon the conclusions of Professor Ogburn, of Columbia University.

We congratulate Mr. Sayre on a very useful piece of work, and the Harvard University Press on a volume of which the workmanship, typographical and otherwise, makes it a pleasure to handle.

A. D. McN.

Workmen's Compensation in Great Britain. By JOSEPH L. COHEN, M.A., F.S.S. Published by the *Post Magazine*, London. (6s. net.)

THIS book is evidently intended not for lawyers but for the student of social questions and the layman whose business it is to acquire a general acquaintance with the problems and the practice of Workmen's Compensation. Judged from this point of view, it is a very capable and lucid summary of the present system, just in dealing with controversial topics and sane in its criticisms and suggested reforms. Most lawyers will admit that until *Smith v. Baker*, in 1891, the current of judicial decision in the nineteenth century told strongly against the injured workman. The doctrine of Common Employment, invented in 1837, is responsible for much of the bad class-feeling which we inherit from the last century. We commend to Mr. Cohen for his next edition a remark upon this doctrine which Professor Kenny quotes in his *Select Cases on the Law of Torts*: "Lord Abinger planted it, Baron Alderson watered it, and the Devil gave it increase." On the other hand, the interpretation by the Court of Appeal and the House of Lords of the Workmen's Compensation Act, 1906, has been remarkably generous to the injured workmen, thereby fulfilling the economic purpose of that Act, that the risk of industrial accident and disease should be borne by the employer (and through him by insurance), instead of being left to ordinary legal considerations of culpability. That much still remains to be done to complete that purpose is demonstrated by Mr. Cohen's book, and we know of no book which gives the reader a better introduction to the problem than this.

A. D. McN.

The Law of the American Constitution. By CHARLES K. BURDICK. New York and London: G. P. Putnam's Sons. 1922. xviii and 687 pp.

THIS book will prove of great value to anyone who is interested in the American Constitution from the legal rather than from the political standpoint. Professor Burdick has taken up each clause of the Constitution separately and has discussed its significance, citing decided cases to prove his points. He has not attempted to discuss the "Conventions of Government," nor does he deal with the political parties and their organization.

The first two introductory chapters are by Francis M. Burdick, late Dwight Professor of Law in Columbia University. In these two chapters the origin of the Constitution is discussed. From the standpoint of the English reader, these chapters would be more valuable if greater emphasis were placed upon the actual difficulties which the Colonies had to face under the Articles of Confederation, and which the Constitution was framed to meet. A study of these difficulties would explain why the Federal Government was given power to deal with questions of inter-State commerce and all questions dealing with foreign affairs; while, on the other hand, the ordinary police powers were left in the hands of the States. It is probable that if the Constitution were to be created *de novo* to-day, the Federal Government would be given wider powers—for example, power to establish laws dealing with marriage and divorce.

Perhaps it may be suggested that Professor Burdick's book would be clearer if, in the arrangement of his chapters, he had followed the order of the Constitution itself. In his book, he first deals with the President and the Judiciary and the general character and organization of Congress. It is only at Chapter VII. that he begins to discuss the actual powers of the Federal Government. From the standpoint of a foreigner who finds difficulty in realizing that the United States Federal Government is a Government of limited powers, it would be better to begin by discussing the powers of the Government, and only later to discuss the methods and means by which these powers are carried out. This is the actual order of the Constitution itself, and there seems to be no advantage in changing it in a text-book.

Professor Burdick has not limited himself to a mere statement of what the Constitution is, and what the Courts have held. Throughout the book he introduces his own valuable opinion as to the wisdom and correctness of certain of the decisions, and also of certain parts of the Constitution itself. On page 49, for example, he discusses the Eighteenth Amendment—the famous Prohibition Clause. He says: "It is submitted, however, that the form of the Eighteenth Amendment is unfortunate. The objections levelled against it on the ground that it is legislative in character, though not proving its unconstitutionality, would seem to constitute a very valid criticism of the wisdom of Congress in submitting it in that form. The Constitution is essentially a framework of government, embodying grants of governmental powers and restrictions upon such powers." In Chapter XIII. he discusses the question of freedom of speech, and severely criticises the decision of the United States Supreme Court in *Abrams v. United States* [1919] 249 U. S. 47. This is the case which was also criticised by Professor Chafee, of the Harvard Law School, in his book *Freedom of Speech*. Professor Burdick agrees with the dissenting opinions of Holmes, J., and Brandeis, J., and quotes at length from the opinion of Holmes, J. It would have been fairer if he had also quoted from the majority opinion so that the reader could have formed his own conclusions. It has always seemed to the reviewer that the criticisms levelled against this famous case have been exaggerated, and that the majority of the Court was right in its conclusions.

There is only one real criticism that can be made of this book, and that is a minor one. The proof-reading is not as accurate as might be wished, and it is suggested that in the second edition the errors should be carefully corrected. To point out mistakes of print in a legal text-book is not pedantic criticism, because the value of such a volume depends to a considerable extent upon the accuracy of its language.

To ears which have been trained to the English style of speaking, Professor Burdick's enthusiastic splitting of the infinitive comes as rather a shock; on page 97 he writes as follows: "...in the case of *Virginia v. West Virginia*, the Supreme Court found itself compelled to squarely face the problem, for it looked for a time as if West Virginia was not going to voluntarily comply with the Court's judgment."

A. L. G.

Byrne's Law Dictionary. By W. J. BYRNE, Barrister-at-Law.
 London: Sweet & Maxwell, Lim. 1923. xliii and 942 pp.
 (Price £3 3s. net.)

THIS excellent book will fill a long-felt want. It is a dictionary so compendious and so accurate that it can be safely recommended for use to the practitioner and the law student. In his modest preface Mr. Byrne says: "The author knows only too well that there must necessarily be many defects in a book which covers so large a field and which has been written single-handed." What defects there are in this book seem to be rather of omission than of commission, and only a captious critic can expect a dictionary to be as complete as an encyclopaedia. Although his definitions are necessarily limited in space, the author has succeeded in making all of them interesting and clear. His definition of law, for example, is a real contribution to juristic literature.

Mr. Byrne seems to be slightly less certain when he meets the law of real property. In his definition of a remainder he says "a remainder is defined (Co. Litt. 93a) as a 'remnant of an estate in lands or tenements, expectant upon a particular estate created together with the same at one time.'" Pollock and Maitland, in their *History of English Law*, Vol. II., p. 22, have shown that this is incorrect: "As a matter of history it is a mistake to think that a remainder is so called because it is what remains after a 'particular estate' has been given away. The verb is far older than the noun and is applied to the land. Indeed, in our law Latin any infinitive of the verb has to do duty as a noun; a remainder is a 'remanere.'"

It is interesting to note that this dictionary follows an entirely different system from Bouvier's *Law Dictionary*, revised by Francis Rawle. In his preface, Mr. Byrne says: "Cases are not cited as a rule; for the citation of cases, unless done thoroughly, is useless; and thorough citations would have doubled the size of the work." Mr. Byrne might also have added that text-books are only cited by him in rare instances. Bouvier's *Law Dictionary*, on the other hand, consists almost entirely of citations. Each of these systems has its advantages, and the only conclusion that can be drawn from a comparison is that he is a wise lawyer who possesses both of these dictionaries.

A. L. G.

Primitive Ordeal and Modern Law. By H. GOITEIN. London:
 George Allen & Unwin, Lim. 1923. xvii and 302 pp.
 (Price 10s. 6d.)

WHEN a book is described in grandiloquent language, there is usually a presumption that it will not justify the claims made for it. The present volume fully proves the wisdom of this presumption. In their advertisement, the publishers say: "This is an attempt to re-examine the nature of law and its place in human development. Much recent research in many fields has been laid under contribution, more especially in anthropology and classical archaeology. But above all it is the wonderful stimulus of some of the newer movements in modern psychology that has made the present work possible."

What is the result of "the wonderful stimulus of some of the newer movements in modern psychology"? In his chapter entitled "Law in the Modern World," in which he sums up his important discoveries, the author says: "The litigant has recourse to a court of law only under very special circumstances. For most good citizens in a modern community an action is a unique event in their lives, and when it occurs it is invested with a peculiar significance. A man does not go to law without some previous inner conflict, of varying intensity, it is true, from something so slight as to escape notice to something not far removed from a pathological state. Something unusual has occurred, something a little out of the ordinary round of the litigant's life, or, it may be, something in his inner life has occurred that makes what is ordinary produce novel effects. Often enough, such is the underlying sanity that marks human conduct, beyond a pause for readjustment and a consequent fresh start, nothing very remarkable happens. But there comes a time, some pert occasion, when readjustment fails to work smoothly, and the inner conflict runs its course. There is a withdrawal of interest from the outside world, that multiplicity of rhythmic reactions that makes up the ordinary round, and a corresponding impetus given to introspection. There is introversion, as it is called, and regression. We all recognize the strident note in the litigant's demeanour, and watch him intent on the assertion of his rights. He proceeds to court—to get the matter settled, once and for all, you know. Expert counsel cannot be certain as to what the law really is. Mine's a peculiar case, you know. . . . There is a stage in love when the lover goes to meet his beloved with no further thought than to ask what she thinks about—Barrie's new play, the New Social Order, anything. He would be justly indignant if told that his motive was an altogether mistaken one. That, perhaps, he goes to see her for the sake of seeing her. We, however, who peep over his shoulder see something of more universal reference than the face of the beloved." Do we really need the wonderful stimulus of modern psychology to teach us that a litigant who goes to Court is usually excited, and that when a lover meets his beloved he unconsciously thinks of something besides the New Social Order?

On page 256, this wonderful stimulus has given us the following illuminating discussion on rights and duties: "At one end stands the possessor of the right, at the other he who is under a duty. But what is a duty? The jurists define it as liability to a penalty. We can now explain whence comes the logical necessity of coupling rights and duties. The strivings that make up this complex are only one part of an ambivalent attitude. The wishes and fears of the subject attach with a pendulum like motion, now to himself and now to the other person. They can be represented thus: 'I am mutilated—Another person is mutilated.' But this is none other than the famous formula of talion, an eye for an eye, a tooth for a tooth. And this is the formula Aristotle conceives himself to be replacing in his treatment of the true nature of rights."

Chapter IX., on "The Nature of Law," concludes with the following definition of law: "The practice of mankind accords well with the more generally accepted views of theoretic speculation, and we may leave the subject with the reflection that law is a compendious name for the sum of the influences that determine decisions in the judge's court." This, after all, is only Gray's conclusion unintelligently translated into unmeaning language.

Finally, on page 192, the wonderful stimulus has given us this original

thought: "The legal reformers stood alone, and it is hard to avoid the conclusion that in them and those to whom they appealed, the legal consciousness was especially developed."

It is only fair to the author to say that he is obviously a widely-read man, and that a number of his quotations are exceedingly interesting. If he had limited himself to the history of the ordeal, his work would probably have been of considerable value.

A. L. G.

The Problem of Proof. By ALBERT S. OSBORN. New York: Matthew Bender & Co. 1922. ix and 526 pp.

MR. OSBORN has written a most interesting book. Although his immediate purpose is to help the lawyer who has a case to try in which it becomes necessary to prove the facts relating to a disputed document, the matter presented is applicable to the general problem of proof, and therefore will prove of wide value.

Many books on law suffer from a lack of style; Mr. Osborn is fortunate in being able to present his interesting facts in such a lucid manner that the reader is charmed throughout the volume. The following sentence is an example of how ably he puts an idea, which, although not novel, cannot be too strongly impressed upon a beginner passing from the study to the practice of the law: "Law study naturally emphasizes the importance of knowing the law, but law practice undoubtedly emphasizes the necessity of knowing the facts. . . . In the preliminary study of law the facts of a case are necessarily assumed, but in actual practice a law suit consists mainly, not in applying the law to the facts, but in proving the facts, to which the law then applies."

Mr. Osborn also has a sense of the dramatic. In beginning his book, he points out the importance of disputed documents under modern conditions by saying: "Only eight disputed signatures in certain contested will cases, represented more than twenty-seven millions of dollars." Throughout his book, he emphasizes all his points by giving concrete examples, many of them apparently from within his own experience.

From the standpoint of the practising barrister, the most valuable part of the book is pp. 168—194, which includes a series of questions to be used in cross-examining witnesses. These pages will also be of interest to the lay reader, because no part of the law is so fascinating to the ordinary man as the battle of wits between counsel and witness.

Quotations from this book might be used to justify the English division between barristers and solicitors. In Chapter VI. the author emphasizes some of the dangers of permitting the trial lawyer to interview his witnesses before the trial. Such a system leads, in a number of cases, to the "coaching" of witnesses. After a certain amount of experience both in English and American Courts, the reviewer has come to the conclusion that there is more false testimony—both conscious perjury and unconscious prevarication—in the American Courts than there is in the English ones. This is believed to be due in large part to the fact that in America the witness is sometimes told what he should say at the trial. On page 107, the learned author also emphasizes the danger of permitting a lawyer who has only occasionally practised in Court to try a case: "A law suit, in many cases, is not the scientific work of trained and skilful specialists,

but it often is a crude performance by the inexperienced and the unfitted. As a rule the surgical clinic shows the skilled work of trained men, but the Court-house often shows the bungling efforts of the unskilled. For every lawyer now and then to try important cases in the Law Courts is as if every doctor attempted, on rare occasions, to perform major operations. The legal operating room shows many mangled legal corpses."

Professor Wigmore, of North-Western University, in his introduction to this book, says: "Chapter XV., on advocacy, is my favourite. I would like to have written that chapter myself,—only I could not. It should be read aloud every year, before every law class." It may well be doubted whether this chapter really is as valuable as Professor Wigmore claims, but it certainly has some interest. The following quotation is an example of Mr. Osborn's views on the training of the lawyer: "That law school would soon be marked that made of all its students attractive, pleasing personalities; that added to knowledge, wisdom; to information, tact; and to intelligence, courtesy. The inherent gentleman carries with him something that gives him instant advantage wherever he may be. He receives a consideration and commands an attention that it is somewhat difficult to analyse and to understand. A man of this kind has back of him and with him—to speak for him—the influence of the gentlemen of all time."

The bibliography, which is of considerable length, is illuminated by Mr. Osborn's comments. In recommending Marcus Fabius Quintilianus, *De Institutione Oratoria*, he says: "He clearly shows how little has been added to the sum of human knowledge on certain subjects in nearly two thousand years. Quintilian would be a distinguished and sought-for member of any college faculty in the world to-day."

A. L. G.

Liability for Dangerous Things. By J. CHARLESWORTH, LL.D.
London: Stevens & Sons, Lim. 1922. xxv and 303 pp.
(Price 10s. net.)

In this scholarly book, Dr. Charlesworth has made a considerable contribution to the already interesting literature surrounding the exceptional rule of liability, commonly known as the rule in *Rylands v. Fletcher*. In his preface, the author points out that the law on this subject is in process of development, and he adds: "The utmost that a writer can do is to present the authorities on both sides so that, while offering his own opinion, the materials are readily available for those who take a different view." This task Dr. Charlesworth has accomplished in a thorough and conscientious manner, and his table of cases includes every important decision on this subject up to the time of publication of the book. In quoting from these cases, the author has not hesitated to include opinions which differ radically from his own views. Since this book has appeared two important cases on the law relating to dangerous things have been decided, and they will of course be included in the next edition. *Glasgow Corporation v. Taylor* [1922] 1 A. C. 44, held that the appellant Corporation was liable for the death of a seven-year-old child, who died as a result of eating poisonous berries growing in the Botanical Gardens of the city. In the case of *Hoare & Co. v. McAlpine & Sons* [1923] 39 T. L. R. 97, it was held that vibrations caused

while constructing a building came within the rule relating to dangerous things. There is an amusing note on this case in the March, 1923, number of the *Yale Law Journal*, p. 498.

The most interesting point in the book is the author's attempt to classify and describe dangerous things. On page 5, he points out that it is impossible to find in the reports anything which attempts to define exactly what we mean by a dangerous thing. On page 6, he quotes various definitions, none of which are really satisfactory. The author then continues to say: "No attempt, therefore, will be made to define the expression 'dangerous thing,' but there are certain characteristics common to all the things specified above which are not present in any other things. To constitute anything a dangerous thing, its power to cause damage must be

- (i) inherent,
- (ii) invariable, and
- (iii) due to human agency."

By a series of ingenious arguments which are too long to be quoted here, he attempts to prove that these three characteristics are essential to every dangerous thing. He says that a firearm is a dangerous thing but a sword is not. "A sword responds directly to an act of human volition; it is a mere instrument, wholly dependent on the person who wields it, and without any power independent of that person." It is difficult to see why a rifle or pistol does not also depend upon the person who wields it, and how it can be said to have independent power of doing harm. In spite of Dr. Charlesworth's able argument, it is submitted that the question as to whether or not a thing is dangerous is purely a pragmatic one, and cannot be answered on principle. The opinion of Darling, J., in *Chichester Corporation v. Foster* [1906] 1 K. B. 167, is an excellent expression of this point of view. He said: "I very much doubt whether anything whatever can, strictly speaking, be called a 'dangerous thing.' That depends on its use—on environment. Water, which caused the injury complained of in *Rylands v. Fletcher*, is only dangerous under certain conditions, and so is fire. The expression 'in itself dangerous' is used in the head-note to *Rylands v. Fletcher*, but I do not find it in the judgment; nor do I think it an appropriate expression anywhere, except perhaps, as used by Mr. Pope in regard to 'a little learning.'"

A. L. G.

"*Law Notes*" Year-Book, 1922. "Law Notes" Publishing Offices, London. (4s. 6d.)

THIS small but exceedingly valuable book surveys the important legal happenings of the past year. It gives a short summary of the statutes of the year, the various Rules and Orders, and the most important cases. It is particularly useful to the student of law in its latter capacity. The cases are summarized with great care, and we have not found a single error in the whole list. Sufficient information is given concerning each case to enable the reader to judge whether or not it is material to the point upon which he is working.

In the present volume the editors have not hesitated to point out an error made in their 1921 volume. On page 109, they state: "The case of *Neilson v. L. & N. W. R. Co.* was wrongly stated on page 107

of *Law Notes Year Book*, 1921." Such editorial honesty gives the reader confidence in the manner in which the book is prepared.

This book will prove of particular value to those libraries, Colonial and American as well as British, which cannot afford to take in the complete law reports.

A. L. G.

Company Precedents. Part I.: General Forms. By SIR FRANCIS BEAUFORT PALMER, Benchers of the Inner Temple. Twelfth edition, by ALFRED F. TOPHAM, LL.M., K.C., assisted by LIONEL L. COHEN, M.A., ALFRED R. TAYLOUR, M.A., and H. S. G. BUCKMASTER, B.A., Barristers-at-Law. London: Stevens & Sons, Lim. November, 1922. La. 8vo. clxxi and 1855 pp. (£3 10s. net.)

Handbook on the Formation, Management and Winding Up of Joint Stock Companies. By the late SIR FRANCIS GORE-BROWNE, M.A., K.C., Master of the Bench of the Inner Temple. Thirty-fifth edition. London: Jordan & Sons, Lim. 1922. La. 8vo. lxxvii and 759 pp. (15s. net.)

SIR FRANCIS PALMER'S *Company Precedents* has long been recognized as indispensable by company lawyers. It contains not only an unusually complete collection of forms, but also notes on company law and practice of the greatest value. To its quality as an authority on the practice of the Courts in all company matters fresh testimony is to be found in the reports of the recent case of *In re Anglo-Continental Supply Co., Lim.* [1922] 2 Ch. 723; and it is especially this quality which has given the work pre-eminence over other books on company law. The completion of a new edition is therefore a welcome event. The new editions of Parts II. and III., dealing with Winding-up and Debentures respectively, were recently published, and the appearance of this volume, which deals with the formation and management of companies subject to the Companies Acts, 1908 to 1917, greatly enhances the value of the work.

Since 1912, when the last edition was published, there has been little legislation affecting companies, nor have there been any marked changes in the attitude of the Courts. The main feature of the period has been the working out of the Companies (Consolidation) Act, 1908; and in view of the criticism which many modern statutes have provoked, it is worthy of note that no serious flaws have been found nor difficulties incurred. Little change has therefore been required in the subject-matter or in the arrangement of this volume. The editors have devoted their energies mainly to bringing the work up to date and to revising the references. This they have done with success, and the greatest credit is due to them for the care which they have exercised in this task. The many inaccurate references in the last edition have been corrected; there appear to be few omissions to add references to recent decisions; and the indexing of the new volume is good. A few parts of the book have been rewritten and improved, and it is to be regretted that the editor had not the courage to undertake the task of rewriting more; several of the original forms now seem to be somewhat diffuse.

The most important additions and alterations in the substance of the work deal with reorganization and reduction of capital, capitalization of profits, and schemes of arrangement, which matters have been the subject of much activity and many experiments in recent years. It is interesting, in this connexion, to notice that in the previous edition it was stated (p. 1439) that the decision in *Thomas v. United Butter Companies of France, Lim.* [1909] 2 Ch. 484, that a sale cannot be made to a foreign company under section 192 of the Act of 1908, had disclosed a flaw in the Act which would have to be remedied. It has, however, been established in *Re Anglo-Continental Supply Co., Lim.* (*supra*), that the difficulty can be overcome by means of a scheme of arrangement under section 120 of the Act. This fact is stated in the new edition at p. 1374; but reference to the above decision has been omitted on that page. With regard to reduction of capital, there appears to be no mention of a method which has recently been sanctioned by the Courts, whereby the nominal amount of a class of shares is reduced, but the shares continue to carry rights to dividends and to return of capital in a winding-up as if there had been no reduction. This development is of interest, and shows that reduction of capital is often little more than a paper transaction, though it may be hedged about with legal formalities.

There has been much interest of recent years in the question of the alteration of articles of association to the prejudice of a minority of the shareholders; and it is suggested that this subject might have been dealt with more fully than at p. 613. It is also a matter of surprise to find that, though one-man companies are fully dealt with, there is no reference to *Inland Revenue Commissioners v. Sansom* [1921] 2 K. B. 492. In one respect there is more serious cause for criticism; a bad mistake appears on p. 904. The form of articles of association for private companies has not been amended to accord with the Companies Act, 1913. The new edition is, however, of great value.

The appearance of a new edition of the *Handbook of Joint Stock Companies* has been a frequent event; and it is a matter for regret that this edition is the last to be edited under the direction of Sir Francis Gore-Browne. Little need be said as to the utility of a book which has reached its thirty-fifth edition. The work is of the greatest use, not only to lawyers, but also to secretaries and others concerned in the administration of companies. We would suggest, however, that it would be of even greater value if a copy of the Companies (Consolidation) Act, 1908, were added as an appendix. The value of the book is due greatly to its compactness and to its convenience as a book of reference, and the fact that it is not complete in itself detracts from this convenience.

The last edition was published in February, 1919, and since that date there has been no great change in the law affecting companies. The new edition, therefore, differs little from the previous one; but the greatest care appears to have been taken in adding references to recent decisions.

B. F. M.

The Elements of Criminal Law and Procedure. By A. M. WILSHERE, M.A., LL.B. Third edition. London: Sweet & Maxwell, Lim. xvii and 308 pp. (12s. 6d. net.)

THE author says in the Preface: "By the exercise of a little courage, not only could the bulk of the criminal law be very considerably reduced,

but it could be reproduced in a form which would enable the student to master its principles without being embarrassed by the mass of detail which now encumbers and obscures them." A very true statement; but, unfortunately, this book has not done anything to simplify things.

Criminal law is a difficult study, but it has a redeeming quality—it can be made interesting to the student. The author has apparently overlooked this quality, for, from beginning to end, he has stated the law in a tabulated form—often of quotations from statutes—in the most uninteresting way possible.

There are no broad outlines in the book; no discussions of the great principles of criminal law. Give a student a thorough knowledge of principles, classify offences, and teach him which principles are applicable to each class, and nine out of ten times he will get the right answers to problems. Give him enough knowledge of the history of criminal law to explain its anomalies and he will get the answer to the tenth problem. The author states a principle in the briefest possible manner and smothers it in lists of petty facts and exceptions.

H. B.

Company Law and Practice: An Alphabetical Guide Thereto.

By HERBERT W. JORDAN, Company Registration Agent, and
STANLEY BORRIE, Solicitor. Fifteenth edition. London:
Jordan & Sons, Lim. 1923. xxx and 464 pp. (Price
7s. 6d. net.)

THE text (pp. 1—256) of this well-known and useful treatise on company law and practice has been revised throughout; and on some matters it has been elaborated. The effect of legal decisions rendered since the appearance of the last edition about a year ago has been embodied in the text; while changes in the practice of the Department of the Registrar of Companies have also been noted. The alphabetical arrangement of topics, characteristic of former editions, has been retained. This arrangement has always proved useful to directors and secretaries of limited companies in consulting this work; for it is easy to find the matter required under the appropriate heading. Officers of companies will find in the new edition the guidance they require in matters not demanding professional assistance; while students will also find a perusal of the work useful to them. The Appendix (pp. 257—422) contains the text of the Companies (Consolidation) Act, 1908, together with its Schedules; the Companies Act, 1913; the Companies (Foreign Interests) Act, 1917; the Companies (Particulars as to Directors) Act, 1917; and the Registration of Business Names Act, 1916. The Appendix also contains the Companies (Winding-up) Rules, 1921, dated July 26, 1921, made pursuant to section 237 of the Companies (Consolidation) Act, 1908. The Index (pp. 423—464) is sufficiently full to be of real service to the reader. Mr. Stanley Borrie assisted Mr. Jordan in preparing the fourteenth edition. In the present edition Mr. Jordan's and Mr. Borrie's names appear on the title-page as joint authors. They are to be congratulated on the appearance of this new edition of a short treatise on an important subject, which is written in a lucid style with due regard to both law and practice.

A Treatise on the Law of Master and Servant. By CHARLES MANLEY SMITH. Seventh edition, by C. M. KNOWLES, LL.B. London: Sweet & Maxwell, Lim. 1922. (30s. net.)

THE book before us is the standard work on the topic of Master and Servant. Its value both to the practising barrister and to the student is too well established to need comment. At the hands of Mr. Knowles it has gained increased usefulness. Former editions attained an average bulk of eight hundred pages, much of which consisted of footnotes on the Canadian authorities. Valuable as these may have been to trans-Atlantic lawyers, in England they tended to overburden rather than to illuminate the text. Mr. Knowles has dealt drastically with them and thereby reduced the book to proportions far more easy to handle. There are passages, however, where we feel that the sidelight from the Canadian decisions might have been retained with advantage, notably with reference to the still vexed question of the course of employment and the vicarious liability of a master for the acts of his servant which are at once criminal and tortious.

The learned editor deals with the line of cases leading up to *Lloyd v. Grace, Smith & Co.* [1912] A. C. 712, including the "commercial brougham" cases. It would be well if the *dicta* of Lord Reading, C.J., in *Mintz v. Silverton* (36 T. L. R. 399), following *Cheshire v. Bailey* ([1905] 1 K. B. 237), were considered in this context.

On p. 254 the case of *Yonge v. Toynbee* [1910] 1 K. B. 215 is cited in support of the proposition that "if a servant do not possess authority from his master to contract in his name or which is in effect the same thing if he exceed the authority given him, or if he fraudulently misrepresent his authority, there can be no doubt that he will be personally liable to the person with whom he deals in his master's name." The case cited and that of *Starkey v. Bank of England* [1903] A. C. 114 certainly lends colour to this doctrine, but it is difficult to see where the element of contract enters at all in these cases; and no action for deceit could lie.

The Index has been thoroughly revised, and the incorporation in it of relevant statutes is a noteworthy feature which other learned editors might copy.

Mr. Knowles is to be congratulated upon a painstaking and admirable edition of the work.

H. E. S.

Elements of Contract. By A. T. CARTER, K.C., C.B.E. Fifth edition. London: Sweet & Maxwell, Lim. 1922. xvi and 290 pp. (12s. net.)

THIS small book has gone into five editions within a comparatively short space of time. It is difficult to predict how many editions it will finally reach, because as a summary of the law of contract it could hardly be improved upon. Mr. Carter has not only succeeded in stating the law in clear and concise language, but he has also included a large number of valuable illustrations.

The only suggestion which we have to offer is that in the next edition a few more modern cases might be cited. It is only natural that a law student should find a recent case more interesting than one which was decided in the distant past.

A. L. G.

The Principles of the Law of Contracts and Torts, with a Short Outline of the Law of Evidence, being *Indermaur's Common Law*, rewritten and enlarged by A. M. WILSHERE, M.A., LL.B. London: Sweet & Maxwell, Lim. 1922. (27s. 6d. net.)

THIS is a volume of some six hundred and thirty pages which purports to deal with the law of contract, tort and evidence in a small compass. The obvious disadvantage of such a work is that it tends to fall between two stools. It is not full enough to be of great value to the practitioner, while to the student it savours of pemmican. Mr. Wilshire, however, has achieved a very useful piece of work within the limits imposed upon him. We are of opinion that he would have been better advised to enlarge "*Indermaur*" with less restraint, and so make the book of real value to the practising barrister and to the student for reference.

The work has been brought up to date in several respects, and some consideration has been given to the question of remoteness of damage in the light of recent decisions. Such topics are necessarily treated with a certain scantiness in a text-book of this size. But perhaps Mr. Wilshire's purpose was to stimulate rather than to satisfy.

H. E. S.

The Law relating to Contract of Sale of Goods. By the late WILLIAM WILLIS, K.C. Second edition, by W. NEMBARD HIBBERT, LL.D. London: Sweet & Maxwell, Lim. 1921. (7s. 6d. net.)

THIS is a second edition of a very interesting and helpful little book which the student will do well to master before proceeding to the greater detail of Blackburn or Benjamin. It contains the substance—and retains the form—of six lectures delivered at Lincoln's Inn during October and November, 1901, by the late Judge Willis at the request of the Council of Legal Education.

The object of the learned author was "to facilitate the study of the provisions of the Sale of Goods Act, 1893" by supplying a commentary upon the more difficult sections thereof. He was by no means an admirer of that famous Code, and in some respects he seems to us to give it less than its due. We may well admit that the Act has its demerits, and that not all of these are demerits naturally incident to codification. In particular we may regret that no attempt was made to dispense with that "curious and excellent learning" (to use a phrase of Coke's) which has grown up around the seventeenth section of the Statute of Frauds: but, on the whole, it would be unreasonable to deny that the Act was one of the best products of the legislative genius of the nineteenth century.

We cannot, for example, concur in the strictures passed upon the sixteenth section of the Act, which provides that "where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained." The learned author declares this rule to be merely subsidiary to a more essential one, viz., that not even the seller has property in the goods until they are ascertained. Thus, if A, who has eighteen gallons of oil, contracts to sell ten gallons to B, no property in the oil passes to B, not simply because the

ten gallons are not ascertained, but because A himself has no property in ten gallons of the oil until they are ascertained. With great respect, we consider this doctrine to be not merely a strain upon the imagination, but also unnecessary to the decisions invoked in support of it—notably *Acraman v. Morrice*, 8 C. B. 449. All that it seems necessary to say in such a case was said by Bayley, J., in *Gillett v. Hill*: “If I agree to deliver a certain quantity of oil, as ten out of eighteen gallons, no one can say which part of the whole quantity I have agreed to deliver until a selection is made. There is no individuality until it has been divided”: 2 Cr. & M. 530, at p. 535. This is not to say that there is no property where there is no individuality; and see *Badische Anilin Fabrik v. Hickson* [1906] A. C. 419.

We have little more to say about this book that is not language of praise. We consider the definition of property, which is worked out, on Austinian lines, in pp. 10-14, to be somewhat misleading. “The sum of all the ways in which a movable or immovable thing can be lawfully used and enjoyed, together with the right to the possession of the same”—these words are applicable only to the interest of an absolute owner in possession. The assertion that section 4 of the Statute of Frauds invalidates the transactions named therein when not in writing—that therefore *Leroux v. Brown* (12 C. B. 801) was wrongly decided because the Court applied a substantive rule of English law to a foreign contract—runs counter to an irresistible current of authority.

A little more information upon the important case of *Morris v. Baron* [1918] 1 A. C. 1 might have been inserted with advantage; but, on the whole, Dr. Hibbert's footnotes supply adequate guidance to the more recent decisions upon this part of our law.

A. D. S.

Roscoe on Evidence in Civil Actions. Nineteenth edition. By J. S. HENDERSON. London: Stevens & Sons, Lim., and Sweet & Maxwell, Lim. 1922. (Price £3 3s.)

THIS classical work, brought down to 1922 by the learned editor, appears well able to satisfy all the demand which can be made on it, and to justify its claim of a *nisi prius* companion.

The cases cited are numerous, and the exhaustive index (276 pp. in the one-volume edition) ensures a ready and accurate reference. From it the practitioner and the advanced student can see at a glance the general principle and the actual decided points, and can obtain reference to the sources.

When the book was written we had not buried the forms of action. The choice of action influenced the preliminary, mesne, and final process. The substantive law was wrapt up in the procedural law. The many distinguished editors maintained to some extent the original formal character of the book, and Mr. Henderson has preferred to follow them rather than recast the whole book. In doing so we venture to think he has taken the right course. Little could be gained by recasting it. On the contrary, interest in the volume might be diminished; and, indeed, if the book were rewritten, it would cease to be *Roscoe's Evidence*.

A. E. R.

The Pocket Bar Final. Vol. I. "Equity." By EDWARD WESTBY-NUNN, B.A., LL.B. London: Stevens & Sons, Lim. 43 pp. (2s. 6d. net.)

A USEFUL little book of reminders for Bar Examinations for a student who knows the subject already. It is too brief for a text-book. For University students it should make a good skeleton on which to build a note-book.

H. B.

Books also received:—

Lawrance's Deeds of Arrangement. Ninth edition. By S. E. WILLIAMS. London: Stevens & Sons, Lim. 1922. xi and 249 pp. (Price, 10s. net.)

Trade Mark Registration, 1905-1919. Second edition. By L. B. SEBASTIAN, F. E. BRAY, and J. Q. HENRIQUES. London: Stevens & Sons, Lim. 1922. xxxvi and 267 pp. (Price, 15s. net.)

Principles of Probate, Divorce and Admiralty. By E. WESTBY-NUNN. London: Stevens & Sons, Lim. 1922. viii and 176 pp.

The Roman Praetors. By GILBERT T. SADLER. London: Stevens & Sons, Lim. 1922. v and 70 pp. (Price, 5s. net.)

The Law of Negotiable Securities. By HIS HONOUR WILLIAM WILLIS, K.C. Fourth edition. By A. W. B. WELFORD. London: Sweet & Maxwell, Lim. 1923. x and 190 pp. (Price, 10s. net.)

The Principles of the Law of Compensation. By C. A. CRIPPS, M.A., B.C.L. (now LORD PARMOOR). Sixth edition. By A. T. LAWRENCE and R. STAFFORD CRIPPS. London: Stevens & Sons, Lim. 1922. lxxxiv and 716 pp. (Price, 35s. net.)



